(16,602.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 119.

M. J. NUGENT, SUPERINTENDENT OF THE TERRITORIAL PRISON OF THE TERRITORY OF ARIZONA, APPELLANT,

vs.

THE STATE OF ARIZONA IMPROVEMENT COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a SUPREME COURT, } ss:
Territory of Arizona, }

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify the annexed instrument to be a full, true, and correct copy of the transcript of the record filed in said supreme court and of all the proceedings had in said supreme court in the case of M. J. Nugent, appellant, against The State of Arizona Improvement Company, appellee; and I further certify that no opinion has yet been filed by said court in said cause in my office, and that the citation hereunto annexed is the original citation issued in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of Arizona this 21st day of May, A. D. 1897, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

J. L. B. ALEXANDER, *Clerk.*

b In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Sup't Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Appellee. } No. 542.

Transcript on Appeal.

Filed this 10 day of Dec., 1896.

J. L. B. ALEXANDER, *Clerk,*
By —— ——, *Deputy Clerk.*

1 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Sup't Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Appellee.

Transcript on Appeal.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT CO. for a Writ of Mandamus.

2 The Territory of Arizona to M. J. Nugent, superintendent of the territorial prison, Greeting:

Whereas it manifestly appears to us by the complaint of the State of Arizona Improvement Company, supported by the affidavit of Eugene F. Ives, president of said company, made in its behalf, that you have, in reply to a proper demand duly made, refused to furnish to said corporation ten able-bodied male convicts out of the

territorial prison at Yuma, properly guarded, on the outside of the gate of the territorial prison at Yuma, on the 2nd day of June, A. D. 1896, at 8 o'clock a. m., and that by such refusal you have unlawfully precluded the said corporation from a right to which it is entitled, and that there is not a plain, speedy or adequate remedy in the ordinary course of law:

Therefore we do command you that you do furnish the said State of Arizona Improvement Company ten able-bodied male convicts out of the territorial prison at Yuma, on the 2nd day of June, A. D. 1896, at 8 o'clock a. m., properly guarded, on the outside of the gate of the territorial prison at Yuma, or that you show cause before this court in the court-house in the village of Yuma, Yuma county, Arizona Territory, at the hour of 9 a. m. the 5th day of June, 1896, or as soon thereafter as the matter can be heard,
3 why the same was not done.

Witness the Hon. A. C. Baker, judge of the third judicial district of the Territory of Arizona in and for the county of Yuma, the 28th day of May, 1896. Attest my hand and the seal of the said court the day and year last above written.

[SEAL.] By C. H. BRINLEY, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT CO. for a Writ of Mandamus.

Now comes your complainant, The State of Arizona Improvement Company, and alleges as follows:

That it is a corporation duly organized and existing under the laws of the Territory of Arizona; that during all the time hereinafter mentioned, M. J. Nugent, a resident of Yuma, A. T., was and now is the superintendent of the territorial prison at Yuma,
4 Arizona Territory; that as such superintendent he has full charge of and control of the prisoners confined in the territorial prison, subject only to the direction of the board of control of the Territory of Arizona.

That on or about the 2nd day of December, 1895, your complainant entered into a contract and agreement with the Territory of Arizona, through its board of control, and on or about the — day of April, 1896, your complainant entered into a supplemental contract with the said territory, through its board of control, which contract, agreement, and supplemental contract the said board of control had full power and authority under the laws of the Territory of Arizona to make, a copy of which contracts are hereto attached and marked Exhibit A and made a part of this complaint.

That on the 25th day of May, 1896, your complainant did demand in writing of M. J. Nugent, superintendent of the territorial prison aforesaid, that in pursuance of said contract he furnish to your complainant on the 2nd day of June, 1896, at 8 a. m., ten able-bodied male convicts out of the territorial prison at Yuma, properly guarded, on the outside of the gate of the territorial prison at Yuma.

That on the 26th day of May, 1896, the said M. J. Nugent
5 served a written notice upon your complainant, whereby he peremptorily declined to furnish said convict labor at such time and place or at any time and place.

That your complainant has no plain, speedy, or adequate remedy in the ordinary course of law.

Wherefore your complainant prays that a writ of mandate issue out of this honorable court, directed to the said M. J. Nugent, superintendent of the territorial prison, directing him and commanding him to furnish to your complainant ten able-bodied male convicts out of the territorial prison at Yuma, on the 2nd day of June, 1896, on the outside of the prison gate of said prison at Yuma, properly guarded, and for other and further relief as to the court may seem meet and just in the premises.

L. H. CHALMERS,
Att'y for Plaintiff.

TERRITORY OF ARIZONA,
County of Maricopa, } ss:

Eugene S. Ives, being first duly sworn, on oath deposes and says that he is the president of The State of Arizona Improvement Company, the complainant herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, and that he makes this affidavit, for and
6 in behalf of the complainant, The State of Arizona Improvement Company.

EUGENE S. IVES.

Subscribed and sworn to before me this 26th day of May, 1896.

L. H. CHALMERS,
Notary Public.

Let an alternative writ of mandamus issue, returnable before the district court in Yuma, Yuma county, A. T., on June 5th, 1896, at 9 a. m.

A. C. BAKER, *Judge.*

This indenture made and entered into this second day of December, 1896, between the Territory of Arizona, by L. C. Hughes, governor, C. P. Leitch, auditor, and M. H. McCord, constituting the board of control of the Territory of Arizona, created by an act of the eighteenth Legislative Assembly of the Territory of Arizona, entitled, "An act to create a territorial board of control for the charitable, penal and reformatory institutions and making an appropriation therefor," approved March 8th, 1895, party of the first part, and the State of Arizona Improvement Company, the party of the second part.

7 Witnesseth, that the party of the second part having submitted its good and sufficient bond for the faithful performance of this contract, which said bond has been approved by the said board of control, and each of its members, and is herewith delivered and accepted, the said party of the first part, for and in con-

sideration of the covenants and agreements hereinafter mentioned, reserved and contained on their part, and on behalf of the said party of the second part to be done and kept and performed, hath granted, bargained, demised, leased and to farm letten to said party of the second part, its successors and assigns, all that certain real estate situated in Yuma county, Arizona Territory, more particularly described as follows, to wit: Fractional sections 12, 13, 14, 15, 22, 23, 24, and 25, township No. 8, south, range 23 west, Gila and Salt River base and meridian, Territory of Arizona, containing two thousand one hundred and fifteen (2,115) acres of land, being the land granted to the Territory of Arizona, by act of Congress, approved January 27th, 1894; also all the labor of the male convicts now in the territorial penitentiary, or who may hereafter be confined therein, to have and to hold the labor of said penitentiary convicts unto said party of the second part, and to its assigns, for the term of ten (10) years from the date of these presents; and the lands
8 and premises above described for and during and until the end of the full term of ten years to be fully completed and ended, and it is further stipulated and agreed by and between the parties hereto that in the event of the removal of the territorial prison from Yuma county, Territory of Arizona, to any other portion of the Territory, such removal will in no way, manner, shape or form interfere with the conditions, stipulations and covenants of this contract and lease.

It is further understood, stipulated and agreed by and between the parties hereto, that the party of the second part is to have the exclusive control of the labor of the convicts in the territorial prison from 8 o'clock a. m. to 5 o'clock p. m., during the said term of ten (10) years from the date of these presents, Sundays and legal holidays excepted.

It is further agreed by and between the parties hereto that the party of the first part, or its agent or agents, will furnish the said convict labor to the party of the second part, at the place or places designated by the said party of the second party, or its agents, in Yuma county, Arizona Territory, properly guarded, clothed, fed and ready to commence work at the hours, and terms heretofore mentioned, and the party of the first part shall properly guard said convicts during the hours of labor. The party of the second
9 part is to furnish all the tools and machinery necessary for the use of the convicts while at work under the conditions of this contract and lease, but the said party of the first part shall not be compelled to take outside of the prison, under guard, parties of less than five convicts.

It is hereby stipulated and agreed by and between the parties hereto, that the convicts shall perform a good day's labor, while at work, to the satisfaction of the party of the second part, and in case the place at which work is required to be performed shall be too great a distance from the prison to admit the convicts returning to the prison at night, they are to be maintained and guarded at some convenient place near the work by the party of the first part. The superintendent of the prison or agent of the Territory having the

convicts in charge shall be required to furnish the convicts in such numbers as may be required from time to time up to the amount of all the able-bodied mail convicts; to deliver them at such points or places in Yuma county, as may be demanded of him, by the party of the second part, its agent or agents. The party of the second part further agrees to keep a current and accurate account of the number of days worked by convicts, and on the first Monday of each calendar month to make a statement of the total number
10 of days done the previous month by all the convicts employed by the said party of the second part, and shall furnish a copy of the said statement to the superintendent of the Territorial prison, properly verified by an agent of the company.

The said party of the second part agrees to compensate the party of the first part for such convict labor as follows, to wit: The value of each convict's labor shall be placed at 70 cents per day, and as soon as the party of the first part has furnished convict laber at the rate of 70 cents per day, aggregating the sum of sixteen hundred ($1,600.00) dollars, the party of the second part shall issue its perpetual water-right deed for eighty (80) acres of land, of the water in its canal, when such canal is completed. The form and language of such deed shall be as near as may be that of Exhibit A, heretofore annexed, which is hereby made a part of this agreement; and the said party of the first part agrees to take, accept and execute said deed; subject to the conditions, covenants, rules, regulations, limitations and qualifications in said Exhibit A set forth and contained—such deed to be attached to the land hereinbefore described belonging to the party of the first part, as said party of the first part shall designate, until water-right deed shall have been issued for all of said lands.

11 It is further covenanted and agreed, by and between the parties hereto, that after the water rights hereinbefore provided for are earned by said party of the first part, then as soon as the labor of convicts at the rate of 70 cents per day, for each day's labor, amounts to sixteen hundred ($1,600) dollars, the party of the second part shall issue water-right certificate for one eighty (80) acre water-right.

The form and language of such certificate shall be, as near as may be, that of Exhibit B, heretofore annexed, which is hereby made a part of this agreement.

It is further understood and agreed by and between the parties hereto that the party of the second part is to have the privilege, at any time, of paying to the party of the first part 70 cents per day in cash for each day's labor performed in lieu of the issuance of water-right certificate; and should the party of the first part desire any time to sell or dispose of any of the certificates for water-rights aforesaid, the party of the second part shall have the option of purchasing the same, at a rate not less than they could be sold by the party of the first part to other parties.

It is further stipulated by and between the parties hereto in consideration of the covenants herein contained, that the said party of

the second part is to use such of said convicts' labor — this
12 contract and lease as it may from time to time require, and
such party of the second part need not commence to use any
of said labor sooner than five months from the date hereof.

It is further stipulated and agreed by and between the parties hereto, in consideration of the covenants herein contained, to be performed by each of the parties hereto, and in consideration of the convict labor herein mentioned, that the lease of the lands herein described shall commence on and from the day when water shall be conducted in the canal of the party of the second part to lands, convenient for the said water to be conducted upon the said lands hereinbefore described, and shall terminate ten (10) years thereafter; and that the party of the second part shall pay to the party of the first part, as rent therefore, an annual sum, to be hereafter determined upon in cash, or at the option of the party of the second part, one-half of the net products of the said lands; provided, however, that the said lease shall commence to run within four years from date.

It is further agreed, covenanted and declared that these presents are made, executed and delivered for the best interest of the Territory of Arizona, and for the purpose of furnishing employment for the inmates of the said Territorial prison—the labor of said inmates
being not required upon any buildings or properties of any
13 institution of the said Territory.

It is further understood and agreed that the continuance and maintainance of this contract by the party of the first part, or its successors, during its entire term, is of the essence thereof, and that the right and privileges which accrue to the party of the first part hereunder, shall be subject to and contingent upon its full entire faithful performance, and shall be forfeited and defeasible in the event of any substantial, persistent or wilfull breach thereof.

It is further understood and agreed by and between the parties hereto, that it is not intended in this contract and lease to do anything contrary to act No. 19, of the 18th Legislative Assembly of the Territory of Arizona, passed March 8th, 1895, and should this contract or lease in any manner conflict with the aforesaid act, such part so conflicting shall be null and void, and those parts not conflicting with said act shall remain in full force and virtue, it being the intention of this contract and lease to comply with the above act in every respect.

In witness whereof, L. C. Hughes, governor of the Territory of Arizona, C. P. Leitch, auditor of the Territory of Arizona, and M. H.
McCord, constituting the board of control of the Territory of
14 Arizona, having hereunto set their hands and seals this day
and year first above written, and the State of Arizona Improvement Company have caused its corporate seal to be affixed

hereto and these presents to be subscribed in its name by its president.

THE TERRITORY OF ARIZONA,
By L. C. HUGHES, *Governor:* [SEAL.]
C. P. LEITCH, *Auditor;* [SEAL.]
M. H. McCORD, [SEAL.]
Territorial Board of Control.

[SEAL.] THE STATE OF ARIZONA IMPROVEMENT COMPANY,
By C. D. BAKER, *President.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, Wade H. Hulings, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared Louis C. Hughes, C. P. Leitch, and M. H. McCord, personally known to me to be the individuals whose names are subscribed to the foregoing instrument as members of the
[SEAL.] board of control of the Territory of Arizona, and they each of them acknowledged to me that they executed the same
15 as members of the territorial board of control for and in behalf and in the name of the said Territory of Arizona for the purposes and considerations therein expressed and in pursuance of an order and resolution of said territorial board of control directing such lease and contract to be executed by said territorial board of control.

Given under my hand and seal of office this second day of December, A. D. 1895.

WADE H. HULINGS,
Notary Public.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, Wade H. Hulings, a notary public in and for the county of Maricopa, Territory of Arizona, on this day personally appeared C. D. Baker, president of the State of Arizona Improvement Company, to me personally known to be the individual whose name is subscribed to the foregoing instrument as the president of the State of Arizona Improvement Company, and he acknowledged to me that he executed the same as the president of said company and for and in behalf of said company for the purpose and consid-
16 erations therein expressed and in pursuance of an order and resolution of said company directing such lease and contract to be executed by signing the corporate name of the company thereto by himself as president of said company and affixing thereto its corporate seal.

Given under my hand and seal of office this second day of December, A. D. 1895.

[SEAL.] WADE H. HULINGS,
Notary Public.

The time for commencing work under this contract is hereby extended to the 10th day of June, 1896, and it is fully understood and agreed by the parties hereto that this extension is in no way to affect the legal status of said contract. It is understood and agreed that the rights of the parties thereto are to remain in *statu quo*, and the extension herein made is not intended to ratify, alter, or impair said contract or to give it any validity whatsoever that it does not before the signing of this instrument possess.

In witness whereof the parties hereto have affixed their names this twenty-second day of April, A. D. 1896.

THE TERRITORY OF ARIZONA,
B. J. FRANKLIN, *Governor;*
C. P. LEITCH, *Auditor;*
M. H. McCORD, *Territorial Board of Control.*

17 THE STATE OF ARIZONA IMPROVEMENT COMPANY,
By EUGENE S. IVES, *President.*

EXHIBIT A.

OFFICE OF THE STATE OF ARIZONA IMPROVEMENT COMPANY.

This indenture and agreement, made this — day of —— A. D. —, by and between the State of Arizona Improvement Company, a corporation, created, organized and existing under and by virtue of the laws of the Territory of Arizona, having its principal place of business at Phœnix in said Territory, party of the first part and the Territory of Arizona party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of the sum of sixteen hundred ($1,600) dollars, the receipt whereof is hereby acknowledged, has granted, bargained, sold and by these presents does grant, bargain, sell, transfer, convey and confirm unto the said party of the second part, its successors

18 and assigns, one (1) eighty-acre water right in the State of Arizona Improvement Company canal, property of the party of the first part. The party of the second part, its successors and assigns, by reason of this conveyance of said water right, shall have the perpetual right to have, demand, receive and use of the water which shall flow through the canals, laterals and other works of the party of the first part, after the completion of the same, on the land, to be used in accordance with the subject to the conditions, limitations, rules, and regulations hereinafter laid down, and to be hereinafter established by the party of the first part, forty (40) miner's inchers of water, or one miner's inch of water to two acres of land.

The said eighty (80) acre water right hereby conveyed and numbered —, is hereby applied and attached to, and is to be used upon and in connection with that certain tract or parcel of land, the description whereof is as follows:

(Take in description of one eighty (80) acre tract of land under the line of the proposed canal belonging to the Territory of Arizona.)

All in section —, township — south, range — west of the Gila and Salt River meridian and the base line lying, situate and being in the county of Yuma, Territory of Arizona.

19 By miners' inch or inch of water, when the terms are used in this deed, it is intended to mean and cover the amount of water which will pass through an aperture one inch square under a pres-ure of four inches of water.

This conveyance is made, executed and delivered under and subject to the following conditions, rules aud regulations:

First. The party of the second part, its successors and assigns, shall have a perpetual right to enjoy the privileges herein conferred on the terms, conditions and limitations herein prescribed and provided, and to such extent shall have a vested and indefeasible interest in the canals, ditches, dams and gates of the party of the first part.

Second. The party of the second part, for itself, its successors and assigns, agrees to pay to the party of the first part, its successors and assigns, on the first day of May of each year, as water rental for the said eighty (80) acre water right, a sum to be fixed by the party of the first part, and not to exceed the sum of two and $\frac{50}{100}$ ($2.50) per acre.

Provided, however, that no water rents shall become due until water shall have been conducted in the canal of the party of the first part, convenient to be conducted on the lands above described, and notice thereof given to the party of the second

20 part.

Third. Said water rights shall be used to irrigate the land above described, and no other land, and for no other purpose except for domestic purposes, and for stock kept thereon, and under no circumstances shall said water, or any portion thereof, be used for mining, milling, municipal or mechanical power, or for another purpose not directly connected with or incidental to agricultural and horticultural purposes.

Fourth. The said party of the first part shall not be required to furnish a greater quantity of water for said water right than may be reasonably necessary for the production of good crops under skillful irrigation and cultivation.

Fifth. The party of the second part, its successors and assigns, shall not permit said water, or any portion thereof to run to waste.

Sixth. The party of the second part, or its agents, shall give written notice to the secretary, or duly authorized agent of the party of the first part, wherever the use of water shall be needed for the purposes aforesaid, stating the amount of water re-

21 quired and the time during which such water shall be required. It shall, thereupon, be the duty of the party of the first part, upon receipt of all water rates then due upon said water right, to deliver to the party of the second part the water to which it is entitled under these presents, at a gate on the line of any canal or lateral branch owned by the party of the first part, most convenient to the lands of the party of the second part above described, and said water shall be measured at such gate by the party of the

first part, and after such measurement the party of the second part shall and does, by these presents, become the owner of such water—the same passes over and through said gate, and the manner of delivery, measuring and regulating the supply of water to the party of the second part shall be prescribed by the party of the first part and shall be at all times under its control, and if the party of the second part or its assigns, or servants or employees, shall in any manner change, open or shut any measuring box, or by any means increase or diminish the flow of water through any gates or apertures, without the consent of the party of the first part, or in case the party of the second part shall use or supply water for any other land than described aforesaid, or shall allow any person to use it except for agricultural or domestic purposes upon the above-described land and premises, or shall in any way whatever take
22 the water from any ditch, canal, lateral or sublateral, supplied with water by the party of the first part except through a weir or measuring gate prescribed by the party of the first part, then the party of the second part shall hereby forfeit at the option of the executive committee or board of directors of the party of the first part, the right to receive water from the party of the first part for the then current year; and also all moneys paid as rental therefor for the current year.

It is further agreed, that if at any time by reason of any cause the supply of water shall be insufficient to fill and flow through said canal according to its estimated capacity, or if from any other cause as aforesaid, beyond the control of said party of the first part, the supply shall be insufficient to furnish an amount equal to all the water hereby conveyed and at the same time covered by rents paid or agreed to be paid for that year, the said party of the first part shall have the right to distribute such water as may flow through said canal *pro rata* to all persons entitled thereto, and for the purpose of so doing may establish and enforce such rules and regulations for the distribution of the water in said canals as it may be necessary or expedient, and said party of the first part shall have the right to turn the water out of the said main canal and
23 shut the water out of laterals or service ditches at any time for the purposes of enlarging, cleaning or repairing said main canal, laterals, sublaterals or dam, or repairing or putting in new or other waste weirs, head gates, water gates, service gates and bridges across said canal or laterals, or any other of the appurtenances of said canal.

Seventh. It is hereby distinctly understood and agreed by and between the parties hereto, that in case the canal of the said party of the first part, through deliveries of water have been made, shall be unable to carry and distribute a volume of water equal to its estimated capacity, either from casual or unfor-seen or unavoidable accident, or if the volume of water proves insufficient from drought or from any other cause beyond control of the said party of the first part, the party of the first part shall not be liable in any way for the shortness or the deficiency of supply occasioned by any of said causes.

Eighth. And the said party of the second part, for itself, its successors and assigns, agrees in consideration aforesaid, to waive and hereby does waive, any and all claims for loss or damages by reason of any leakage, percolation, seepage or overflow of water from any canal ditches, or from any reservoir lakes or laterals, of said
24 party of the first part, either upon the land aforesaid or any other tracts belonging to said party of the second part, anything in any statute, law or custom to the contrary notwithstanding.

Ninth. The said party of the second part shall construct and maintain in good order and repair, a ditch upon said lands of such size and grade, and at such point and location as shall be prescribed by the party of the first part, to catch and conduct to some main lateral ditch of the party of the first part, or to some natural drainage, wash or depression, all waste water flowing upon said tract of land.

Tenth. The right of way over and through the tract of land hereinbefore described, and all other lands belonging to the party of the second part, for all main canals, laterals and sublaterals, ditches, waste-water ditches, washes and natural depressions required by the party of the first part, or by any person or persons at any time entitled to water out of the canal of the party of the first part, is hereby granted unto said party of the first part, and to such person or persons entitled to water as aforesaid; and it is hereby covenanted that all ditches constructed under this agreement shall be under the perpetual control of the party of the first part, its successors and assigns, but that the party of the second
25 part assumes the responsibility to, and will at all times so control all water furnished it, by virtue of this contract, as to prevent it from flowing upon or injuring in any manner the property of any other person, or property of the party of the first part.

Eleventh. And the said party of the first part, its successors and assigns, at all times hereinafter, shall have the right to add to or change or modify the foregoing rules and regulations, or any of them so far as may be reasonable and necessary to regulate the delivery and distribution of water to said party of the second part, its successors and assigns.

Exhibit B.

Water Right Certificate of the State of Arizona Improvement Company.

This is to certify that, for valuable consideration heretofore given to the State of Arizona Improvement Company, a corporation organized and existing under the laws of the Territory of Arizona, the bearer is entitled, upon the surrender of this certificate, to a conveyance by the State of Arizona Improvement Company of one
26 (1) eighty (80) acre water right; said conveyance shall be, as near as may be, identical in form, language, purport, and intent with a certain proposed conveyance of water right attached

to and made a part of a certain agreement executed between the State of Arizona Improvement Company and the Territory of Arizona and the board of control thereof on the 2nd day of December, A. D. 1895.

Said water right shall be applicable to a definite eighty (80) acres of land under the flow of the canal of the State of Arizona Improvement Company, to be fully described in said conveyance, and shall be subject to all the conditions, covenants, regulations, limitations, and qualifications in the aforesaid agreement set forth and contained.

This certificate is issued in pursuance of a resolution of the board of directors of the State of Arizona Improvement Company passed on the — day of ——, 189–, and recorded in a minute book of the company on pages —.

In witness whereof the State of Arizona Improvement Company has caused these presents to be signed by its president and its corporate seal to be hereto affixed this — day of ——, 189–.

THE STATE OF ARIZONA IMPROVEMENT CO.,
By —— ——, *President.*

27 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT CO. for a Writ of Mandamus.

TERRITORY OF ARIZONA, *County of Maricopa,* } ss:

Eugene S. Ives, being duly sworn, says that he is the president of The State of Arizona Improvement Company, the complainant herein.

That he purchased and paid for nine-tenths ($\frac{9}{10}$) of the stock of the said corporation after the execution and delivery of the contract in the petition set forth and relying thereupon.

That since said purchase of said stock the deponent has sold a large portion thereof to residents of the city of New York and Washington and has been paid for the same.

The said sale and purchase were made upon the strength of the said contract, the purchasers relying upon the same.

28 That the main purpose for which the said corporation was organized is to construct a canal out of the Colorado river to irrigate a large tract of land in the Territory of Arizona.

That the said corporation has sold water rights in the said proposed canal for a sum of money aggregating upwards of $200,000.

The said water rights were purchased upon the strength of and in reliance upon the said contract.

That the said corporation is ready and willing and able to commence and continue the construction of the said canal and proposes so to do.

That it is prepared financially to work a full complement of able-bodies convicts at the territorial prison at Yuma.

That deponent believes it to be of vital importance that the construction should be commenced without delay.

EUGENE S. IVES.

Subscribed and sworn to before me this 27th day of May, 1896.

[SEAL.] L. H. CHALMERS,
Notary Public.

29 Received copy of the within proceedings and service hereby accepted this 28th day of May, A. D. 1896.

M. J. NUGENT,
Supt. Territorial Prison.

A true copy as the same appears on file in my office.

Witness my hand and seal of said court this 10th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT CO. for a Writ of Mandamus.

M. J. Nugent, superintendent of the territorial prison at Yuma, in the county of Yuma and Territory of Arizona, responding to the alternative writ of mandamus herein, says:

30 That he excepts to the sufficiency of the petition of the applicant for the said writ herein, to wit, *that* the State of Arizona Improvement Company, and the showing therein and therewith made, and demurs thereto for the following reasons, to wit:

1st. That the said petition and the exhibits thereto fail to state facts sufficient to authorize the writ of mandamus to issue herein.

2nd. That the said petition and the said Arizona Improvement Company, by and through the said petition, seek to compel the performance of an act on the part of this respondent as superintendent of the territorial prison, which the law does not especially enjoin upon him as a duty resulting from his office.

3rd. Because the said petition seeks only to compel the performance of a contract made by others and not the said respondent.

4th. Because the said petition seeks to compel the performance of a void contract, authorized only by a pretended law, which is void.

Wherefore he prays to be discharged, exonerated, etc.

M. J. NUGENT,
By J. F. WILSON, *Attorney.*

31 Respondent, further answering as to the merits, responds and gives the court to know:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT Co. for a Writ of Mandamus.

Return of M. J. Nugent, as Superintendent of the Territorial Prison, Arizona, to the Alternative Writ of Mandamus Issued Herein.

The said M. J. Nugent, as such superintendent, respectfully shows:

I.

That there is a defect of parties defendant in the above application, in this, that said superintendent is an appointee of the governor, chairman of the board of control mentioned in said application, holding his office for the period of two years from such appointment, unless sooner removed for misconduct, incompetency, or neglect of duty; that certain portions of the duties of said superin-
32 tendent are provided for by the statutes of Arizona as incumbent upon said superintendent to — and perform, such as the care and custody of the prisoners directed by courts of competent jurisdiction to be confined therein as punishment for criminal offenses of which such prisoners had been previously convicted; that certain other duties incumbent upon said superintendent to do and perform are rules and regulations which have been or may be prescribed by said board concerning the care and custody of such prisoners; that the pretended contract, a copy of which purports to be attached to the application herein, purports to have been executed on behalf of the Territory of Arizona by said board of control, and said application should have been brought against said board of control and not against said superintendent, as more fully appears by reference to said application and the exhibits thereto attached.

II.

That under an act of Congress approved June 16th, 1880, the legislature of Arizona was authorized to make provision for the care and custody of such persons as may be convicted of crime under the laws of the Territory as such Territory shall deem proper; that thereunder the Territory of Arizona, by its legislature, caused
33 the territorial prison thereof to be located and erected at the village of Yuma, in the county of Yuma, in said Territory; that the legislature of said Territory has heretofore enacted a law and sundry laws requiring the courts of competent jurisdiction sitting in the Territory to punish all persons convicted in such courts of offences to sentence such convicted persons to imprisonment in said territorial prison in all cases where the law prescribes that the punishment for the offence of which such person *has* been convicted shall be, by a sentence of such court made, imprisonment of such person in said penitentiary during the term of such sentence; that under and by virtue of the laws of Arizona the board of control

has no authority or power to direct or authorize said superintendent to exercise the right of care and custody of the persons confined in said penitentiary at any place or places other than in said penitentiary during the life of a sentence of any person duly directed to be confined therein.

III.

This defendant denies that the said board of control *has* not had nor have they heretofore had nor have they now fully or any power and authority under the laws of the Territory of Arizona to make the contract or any contract a copy of which is set out in the application herein.

34 This defendant further denies that he, as such superintendent, has full charge of, or had at the time of the filing of such application or at any time previously hereto, or that he has now full charge and control of, the prisoners confined in the territorial prison; and he further denies that whatever charge or control he may have of such prisoners such charge and control is not subject only or exclusively to the direction of the board of control.

IV.

It is further shown that said board of control, under act number 19 of the Session Laws of 1895 or under any other law of said Territory, has not heretofore had and has not now any power or authority to make, execute, or deliver the pretended contract a copy whereof purports to be attached to the application herein, in this, to wit:

That the act of the legislature recited in said pretended contract was approved March 8th, 1895, and said contract purports to have been made and entered into on the 2nd day of December, 1895, whereas, in and by said act of March 8th, said board had no power or authority in the premises after the sixtieth day from the approval of said act.

35 That said act approved March 8th, 1895, is so indefinite and uncertain as to its provisions that the said act does not vest any power or authority in said board and is inoperative in this, to wit:

That said act purports to grant power and authority to lease buildings and lands therein mentioned on shares and does not provide what moiety of said shares shall belong to the Territory or who shall determine what share or part thereof shall belong to the Territory nor what such share shall be of—that is, whether of the product of the soil, either net or gross, or whether such share shall be the profits or a part thereof in speculative or other venture.

That in and by such act it is provided that inmates of said prison may have their labor furnished under contract to responsible persons when the same may be for the best interests of the Territory, but nothing therein contained defines what shall be or who shall determine what the best interests of the Territory are in the premises.

This defendant further shows that at the time of making said pre-

tended contract and of the making of the pretended demand in the application alleged a large proportion of the inmates of said prison, estimated at three-fourths of the total number then therein, were convicted and sentenced to imprisonment therein for offenses committed long prior to March 8th, 1895; that under the laws
36 existing in said Territory prior to that date, to wit, the penal code, which went into effect the last day of July, 1887, and acts amendatory and supplemetary thereto, the power — granted solely to the judiciary of this Territory to imprison persons convicted of crime in said prison; that under the laws of this Territory no power is granted, nor is there under the Constitution of the United States, or laws of Congress any granted or inherent power in the judicial department of this Territory, to cause any person convicted of crime to be punished by working at hard labor in addition to imprisonment in said penitentiary.

That chapter 51 of the Revised Stat-es was approved March 10th, 1887, and went into effect immediately, whereas the penal code of 1887 did not go into effect until 12 o'clock noon on the 1st day of July, 1887, and thereby repealed any power or authority which the legislative department of this Territory may have granted to the executive department of the Territory under said title 51 to impose upon the inmates of said prison an additional punishment of work at hard labor or any labor at all.

Your defendant further shows that the legislative department of this Territory had no power or authority under or by virtue of the said act of March 8th, 1895, to grant to the executive depart-
37 ment of this Territory, with the said board of control, to contract for an additional punishment to the inmates of said prison, or any of them, by leasing their manual or other labor to any person or persons whomsoever.

This defendant further shows that within the laws of this Territory no power can be exercised by the executive or judicial department thereof whereby the labor of inmates, or any one of them, can be a source or cause of punishment or of contract or of such labor enforced.

V.

This defendant further shows that it is nowhere alleged in said application or shown that the said board of control have advised or informed this defendant, as such superintendent, that the pretended contract mentioned and described in the application herein was at any time heretofore executed and delivered, or that said board of control has at any time heretofore authorized, empowered, or directed this defendant, as such superintendent, to comply with or conform to any of the provisions of said pretended contract or deliver any inmates of said prison to the applicant at the gates of said prison, under guard or otherwise.

VI.

38 This defendant further shows that the said pretended contract mentioned and described in the application herein is

without consideration, power, or execution or operative, in this, to wit:

That it binds the Territory to furnish labor therefor without any remuneration or compensation to the Territory; it lets the lands of the Territory without any remuneration or compensation to the Territory.

VII.

That the said contract shows upon its face that the said board of control had no power or authority to execute the same, and is unconscionable, in this, to wit:

That the pretended bond therein recited and referred to is therein shown to have been executed, delivered, and approved before the execution of the pretended contract, whereas in and by the said law of March, 1895, after the contract was executed the said bond was given for the performance of the contract.

That in and by the provisions of said pretended contract all the labor of all the male convicts on December 8th or thereafter confined in said prison is leased without making any provisions for inmates who are ill or unable to perform labor from the exceptions of said contract, and said contract does not make any provisions for the exemption therefrom of any trusties or other inmates
39 necessarily performing service within said penitentiary, under the reasonable rules and regulations thereof.

That said pretended contract discloses upon its face that it is not to the best interests of said Territory, in this, that the same pretends to be a contract for ten years, and that in the event of the removal of the territorial prison to any other portion of the Territory such removal will in no way, manner, shape, or form interfere with the conditions, stipulations, and covenants of the pretended contract and lease, whereas in truth and in fact the cost and expense of transporting inmates of said prison from the location thereof to said Yuma county will presumably be largely in excess of any remuneration or compensation which may be received by said Territory under the provisions of said pretended contract, and that it is not to the interest of said Territory to have its boards or officers make and enter into a contract whereby the expenses of said Territory in the performance of such contract would be in excess of the remuneration or compensation to be derived therefrom.

That the said pretended contract does not contain any express provision that it is made upon the express condition that at no time shall the labor of the inmates of the said territorial prison be leased to any person or persons when the labor of the inmates of
40 said institution is required upon any building or properties thereof, but leaves the question of said condition not to the contract of the parties, but to the courts, to be determined by litigation as to what acts shall constitute such condition.

That said pretended contract does not contain any provision defining the kind or character of the work required and to be required of said inmates, or providing for the safety of said inmates or the health thereof, or any negligence which may on the part of said

company cause injuries to said inmates resulting in necessary injury and damage for which the said Territory of Arizona may be required to compensate and pay; that such work may be of such unhealthy character as to cause sickness to said inmates and corresponding expense to said Territory.

That no provision is herein made for saving the Territory harmless in case where any convict or convicts may refuse or decline to work at the request of said company.

That there is no provision in said pretended contract providing who shall determine who of said inmates, if any, are able-bodied me-, permitting thereby disputes between the parties thereto which may result in expensive litigation to the Territory.

41 That in and by said contract it is provided in one place that the party of the second part is to have the exclusive control during the ten years from the date of the instrument, but in a subsequent and controlling portion of said contract it is provided that the said instrument shall expire and be determined at the termination of ten years from the day when water shall be conducted into a canal, to be constructed in the future, which date is uncertain and unascertain-, except that the same shall not exceed four years from the date of the execution of said instrument, thereby contravening the provisions of said act of March, 1895, in this, to wit:

That no contract or lease shall be made to extend for a term of more than ten years from the time of making said lease or contract, whereas in truth and in fact said contract and lease is not to expire until fourteen years from the date thereof.

That under and by virtue of the act of March, 1895, said board of control are empowered to make an agreement only for share or for cash, whereas in and by said contract the said board of control does not obtain or be remunerated or compensated by any shares in any property, real or personal, or of anything of value, nor is there any provision in said contract by which, for anything to be done or performed by the said board of control, is the said

42 board or the said Territory to be paid in cash therefor, but, on the contrary, — the express condition of said contract in one place the compensation is fixed at 70 cents per day, payable not in cash, but in chips and whetstones, to wit, certain water rights therein described, which may or may not have any cash equivalent or other value; that in another place in said contract it is optional with the second party thereto, but not obligatory on its part, to pay for such labor in cash, and for such labor it may pay in certificates to water rights, and thereafter purchase said water rights back at a price which they may be sold to other parties *there*for, which may be a sum considerably less than the price of 70 cents per day if paid in cash.

That in said contract the rent rate is not definitely fixed, but is left to the future determination of the parties thereto, and therefor executory.

VIII.

This defendant further shows that said contract is without consideration, executed with-authority, is unconscionable, and against the best interests of the Territory, in this, to wit:

That it is against public policy to have the inmates removed
43 from said penitentiary and to permit them to remain without the walls thereof overnight or at all.

That by said contract certain territorial lands and prison labor are yielded to the exclusive control of the company; no obligation is imposed upon that company to defray any of the expenses of or safely keep prisoners while outside the prison walls.

Said pretended contract binds the Territory to a lease of the lands and to furnish such labor at any time or place in said Yuma county to be designated by the company, and binds the Territory to properly guard them, feed them, clothe them, pay their transportation expenses, and to have them on hand at any time and within the hours named by the company, and as compensation therefor the first party nor the Territory does not receive the shares of any property of value or any ca*hs* within the meaning and intent of the act under which said contract is pretended to *to* have been executed.

That said contract is a granting to said company of an especial privilege in direct prohibition of the organic act of the Territory.

IX.

This defendant respectfully shows to the court that as the duly appointed, qualified, and acting superintendent of the ter-
44 ritorial prison at Yuma, Arizona, previous to the service of the alternative writ herein, this defendant was advised and informed by the Honorable B. J. Franklin, as governor of the Territory of Arizona, that the said pretended contract mentioned in the application herein was and is of no valid force and effect, and further advised and informed in substance and to the effect that said contract was not of any legal force or binding effect upon said Territory or said board of control, and, among other things concerning the same, the said Honorable B. J. Franklin, acting as such governor, authorize- and direct- this defendant in substance and to the effect that in the event that the said State of Arizona Improvement Company should, by its officers or agents, make a demand upon this defendant to do or perform anything under the provisions of said contract, and especially if such demand should be made for the delivery of any prisoners confined in or inmates of said penitentiary to the said company, its officers or agents, at the gate of said prison or elsewhere, that this defendant, acting as such superintendent, should politely, but firmly, refuse such request or any request made or to be made under the provisions of said pretended contract; that

acting under the advice and information given by the Honor-
45 able B. J. Franklin, governor of this Territory, and of the direction of the head of the executive department of this Territory, this defendant alleges that he made the refusal complained of in the application herein and not otherwise.

The said defendant and respondent herein respectfully represents and shows to the court that the said contract authorizes and requires an indebtedness on the part of the Territory to be contracted by and on its behalf for additional guard hire, for transportation for guards, for the purchase of water rights, and other things in said contract named, none of which is to meet the casual deficits in the revenue, nor to pay interest on the territorial debt, nor to suppress insurrestion, nor to provide for the public defense, and all of which, when added to the already existing indebtedness of said Territory, will cause a total indebtedness of said Territory of more than one per cent. of the assessed value of taxable property in such Territory as shown by the last general assessment for taxation; therefore respondent avers that the said contract is contrary to the organic act of the Territory and should not be enforced.

XI.

Respondent further avers and gives the court to know that the execution of said contract would be to interfere with the executive prerogative of the governor of the Territory, and to prevent the enforcement and exercise of the same, and is therefore null.

46

XII.

Respondent further avers and gives the court to know that the State of Arizona Improvement Company has not, before the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any of the courts of this Territory for the faithful performance of said contract, as required by said pretended board-of-control act.

Wherefore this defendant prays that the said State of Arizona Improvement Company may take nothing by its said application, and that this defendant may go hence without day and recover his cost herein.

M. J. NUGENT,
Supt. Territorial Prison, Defendant,
And the relation of J. F. WILSON,
Attorney of the Territory of Arizona.

A true copy as the same appears of file in my office.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

47 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, Plaintiff,
vs.
MICHAEL J. NUGENT, Superintendent of the Territorial Prison at Yuma, Defendant.
} Judgment.

This cause having come on for trial on the 9th day of November, 1896, upon the complaint and the defendant's demurrer and answer, L. H. Chalmers appearing for the plaintiff and Hon. J. F. Wilson, attorney general, for the defendant, and defendant's demurrer having been overruled, and no evidence having been offered other than the contracts in the complaint set forth, and the defendant having declined to amend the pleadings or offer further evidence, and having elected to rest upon the pleadings as filed, and the court finding for the plaintiff and against the defendant—

Now, on motion of L. H. Chalmers, Esq., attorney for the plaintiff,

48 It is ordered, adjudged, and decreed that the plaintiff has no plain, speedy, or adequate remedy at law and is entitled to the writ of mandamus to compel its admission to the use and enjoyment of its rights to the convict labor as by the terms of the contract provided, and

That a peremptory writ of mandamus do now issue, commanding and directing M. J. Nugent, superintendent for the territorial prison, to furnish the State of Arizona Improvement Co. ten (10) able-bodied male convicts out of the territorial prison at Yuma on the 3rd day of December, 1896, at 8 a. m., properly guarded, on the outside of the gate of the territorial prison at Yuma.

It is further ordered, adjudged, and decreed that the plaintiff may have leave to apply at the foot of this decree for such further writ of mandamus or other and further relief as may be meet or just in the premises.

Done in open court this 9th day of November, 1896.

A. C. BAKER, *Judge.*

A true copy as the same appears on file and on record in the Book of Judgments of this court, pages 48 and 49, and docketed in judgment docket in my office.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

49 [SEAL.] C. H. BRINLEY, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, Plaintiff.
vs.
M. J. NUGENT, Supt. Territorial Prison, Defendant.
} Motion for New Trial.

The defendant, M. J. Nugent, moves the court for a new trial in this cause for the following reasons, to wit:

First.

Because the court erred in rendering judgment of mandamus against him as the superintendent of the territorial prison, requiring him to deliver prisoners to the plaintiff herein outside the prison walls of the territorial prison for the purpose of rendering hard labor to plaintiff by virtue of the said contract declared on herein in this cause, because—

50 1. He, as such superintendent of the said territorial prison, is but the agent of the territorial board of control, which said board has the absolute control of the prison and the prisoners required to be delivered by the said judgment, and said board of control should have been sued herein instead of this defendant.

2. Because the said judgment requires this defendant to submit the said prisoners to the control of the said plaintiff to have the penalty of hard labor imposed on them, when there is no such labor nor any such penalty imposed on them by the judgment of the court that sentenced them nor any law of this Territory authorizing such to be done; therefore the said judgment requires this defendant to do that which is not authorized by law.

3. Because the said judgment requires this defendant in mandamus to do that which is to enforce contractual rights of the plaintiff with the Territory as by specific performance, when, if there is any real breach of a valid contract, there is another remedy at law for the same, and because he further says:

That the contractual rights of the plaintiff cannot be legally enforced in this way, for it is a common-law right and of a personal nature, and hence the remedy is not properly sought, and

51 mandamus will not in such action as this and in this action lie; hence the court erred in overruling defendant's demurrer herein.

Second.

Because the court erred in overruling defendant's demurrer herein and in rendering judgment against plaintiff herein for the following reasons, to wit:

1. Because the said complaint and the exhibits hereto attached show on their face that plaintiff seeks to require the defendant to deliver the said prisoners named in said complaint to plaintiff and submit them to the penalty of hard labor, when no such judgment

was ever rendered against them therefor, and hence seeks to require defendant to do that which is not required by law.

2. Because the said complaint seeks to enforce simple contractual rights between plaintiff and the Territory and of a personal nature, and therefore mandamus will not lie therefor.

3. Because the said complaint seeks to enforce the special performance of a contract of a private and personal nature by the extraordinary remedy of mandamus instead of by an action directly therefor against the parties engaged therein, and who are parties thereto, and which is not the province of the remedy by mandamus, and hence, for such purpose, the action will not lie.

52 5. Because the action seeks to enforce a contract which, if enforced, would be to confer a special privilege on the plaintiff corporation, which is prohibited by section 1889 of the organic act of the Territory.

6. Because the action seeks to coerce the Territory indirectly by sueing defendant as its agent without its consent so to do.

Hence defendant says his demurrer should have been sustained, and therefore he prays for a new trial herein.

M. J. NUGENT, *Defendant,*
By the Attorney General.

A true copy as the same appears of file in my office.

Witness my hand and seal of said court this 17th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

In the District Court of the Third Judicial District, Territory of Arizona, County of Yuma.

53 In the Matter of the Application of THE STATE OF ARIZONA IMPROVEMENT COMPANY for the Writ of Mandamus to M. J. Nugent, Superintendent of the Territorial Prison.

The parties being present, the petitioner by L. H. Chalmers, Esq., and the respondent by J. F. Wilson, attorney general of the Territory of Arizona, the court delivers its opinion and judgment that the writ issue, and so ordered.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, Petitioner,
vs.
M. J. NUGENT, Superintendent of the Territorial Prison, Respondent.

Now comes the respondent, by counsel aforesaid, and files motion for new trial, which is heard, overruled, and denied; to which ruling of the court, as well as judgment rendered on the writ, respondent excepts and gives notice of appeal in open court.

Minutes of the court of date November 9th, 1896, pages 145 and 146 of said court minutes.

54 A true copy as the same appears on the minutes of the cour on said day.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, Plaintiff,
vs.
MICHAEL J. NUGENT, Superintendent of the Territorial Prison at Yuma, Defendant.

The Territory of Arizona to M. J. Nugent, superintendent of the territorial prison, Greeting:

55 Whereas it manifestedly appears to us by the affidavit of Eugene S. Ives on the part of the State of Arizona Improvement Company and the party beneficially interested herein that on or about the 2nd day of December, 1895, the State of Arizona Improvement Company entered into a contract and agreement with the Territory of Arizona, through its board of control, and that on or about the — day of April, 1896, the said State of Arizona Improvement Company entered into a supplementary contract with the said Territory; that according to said contract your complainant, The State of Arizona Improvement Company, was and is entitled to the labor of the able-bodied male convicts in the territorial prison at Yuma, in Yuma county, Arizona Territory, and on the 25th day of May, 1896, your complainant, The State of Arizona Improvement Company, did demand in writing of M. J. Nugent, superintendent of the territorial prison aforesaid, that, in pursuance of said contract, he furnished to the complainant on the 2nd day of June, 1896, at 8 a. m., ten (10) able-bodied convicts out of the territorial prison at Yuma, properly guarded, on the outside of the prison gate at Yuma;

That you, the said M. J. Nugent, on the 26th day of May served a written notice upon the complainant, The State of Arizona Improvement Company, whereby you, the said M. J. Nugent, peremptorially declined to furnish the said convict labor at such
56 time and place or at any time and place; and whereas a judgment and decree was entered in the above-entitled cause on date Nov. 9, 1896, directing that a peremptory writ of mandamus issue as prayed for in the complaint in this action; and whereas it manifestly appears that the State of Arizona Improvement Company is entitled to the labor of all the male convicts confined in the territorial prison in Yuma county, Arizona Territory; and whereas there is no plain, speedy, or adequate remedy in the ordinary course of law in the premises:

Now, therefore, we do command you that immediately after the receipt of this writ you do furnish the State of Arizona Improvement Company ten (10) able-bodied male convicts out of the territorial prison at Yuma, in Yuma county, on the 3d day of December,

1896, at 9 a. m., properly guarded, on the outside of the territorial prison at Yuma, in Yuma county; and of this writ and of what you have done thereunder make due return on or before the 10th day of December, 1896.

Witness Honorable A. C. Baker, of the district court of the third judicial district of the Territory of Arizona in and for the county of Yuma, at the court-house, in said county of Yuma, and the seal of this court, this 9th day of November, 1896.

C. H. BRINDLEY, *Clerk.*

57 Received service of the within writ this 9th day of November, 1896.

M. J. NUGENT,
Supt. Territorial Prison.

A true copy as the same appears on file in my office.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

In the District Court of Yuma County, in the Territory of Arizona.

THE STATE OF ARIZONA IMPROVEMENT CO., Plaintiff,
vs.
M. J. NUGENT, Superintendent, Defendant.

58 The defendant in the above cause comes and makes the following assignment of errors alleged to have been committed by the court at the trial of this cause, to wit:

1. The court erred in overruling defendant's demurrer herein and erred in rendering judgment on the pleading as made and filed for the following reasons, to wit:

1. Because the complaint and exhibits thereto attached show upon their face that plaintiff seeks to require the defendant to deliver the said prisoners demanded to the said plaintiff and to submit them to the penalty of hard labor, when no judgment was ever rendered against them therefore, nor is there any law in this Territory to authorize such a judgment to be so rendered, and therefore an effort to require defendant to do an act not authorized by law.

2. Because the plaintiff in its said complaint seeks to enforce simply contractual rights claimed by it arising upon a common-law right growing out of a contract of a personal nature to it, and therefore mandamus will not lie therefor.

3. Because the said complaint of plaintiff seeks to enforce the specific performance of a contract between itself and the
59 Territory and of a private nature to it by the extraordinary writ of mandamus instead of by a direct action for that purpose against the parties to the said contract, and for which purpose defendants aver- the action brought will not lie.

4. Because the plaintiff seeks to require the defendant by mandamus to do an act as a public officer which the law does not es-

pecially enjoin on him as a duty resulting from his said office, and hence the said remedy of mandamus will not lie.

5. Because the said action seeks to enforce a private contract which, if enforced, would be to confer a special privilege on the plaintiff corporation growing out of a territorial law, which could not be conferred by the law itself and which is in violation of sec. 1889 of the organic law of the Territory.

6. Because the action seeks to coerce the action of the Territory by suing the agent of the alleged contractors of the Territory and not the real agents who made the alleged contract and without the consent of the Territory, and hence not against the proper parties to said alleged contract.

Wherefore defendant prays the judgment of this the supreme court of the Territory of Arizona that the said judgment of
60 the court below be reversed with directions to said court to sustain defendant's demurrer in said cause and to render judgment in his favor on the pleadings filed in said action.

7. Because the court erred in overruling defendant's motion for new trial for reasons therein set forth.

(Signed) M. J. NUGENT,
Superintendent,
By J. E. WILSON,
Attorney General for Arizona.

A true copy as the same appears of file in my office.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

[SEAL.] C. H. BRINLEY, *Clerk.*

61 In the District Court of Yuma County, in the Territory of Arizona.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, Plaintiff,
vs.
M. J. NUGENT, Superintendent of Prison, Defendant. } Appeal Bond.

Whereas in the above-entitled cause, pending in the district court of said county of Yuma, in said Territory of Arizona, on the 9th day of November, 1896, the said plaintiff, The State of Arizona Improvement Company, recovered judgment from the said defendant in mandamus, requiring the said defendant, as the superintendent of the territorial prison, to deliver to the said plaintiff ten able-bodied prisoners outside the said prison walls, in obedience to the prayer of plaintiff herein; and

62 Whereas the said defendant is desirous of appealing from the said judgment and has appealed to the supreme court of the Territory of Arizona; and

Whereas the clerk of said court has fixed the probable amount of cost in said cause in the court below, and also in the supreme court, at $100 (one hundred dollars):

Now, therefore, we, M. J. Nugent, as such superintendent, and Isaac Levy and John Stoffela, as sureties, acknowledge ourselves bound to pay to the said plaintiff the sum of two hundred and fifty dollars ($250).

Conditioned that the said M. J. Nugent shall prosecute his said appeal with effect, and shall pay all the costs that have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 12th day of November, A. D. 1896.

(Signed) M. J. NUGENT.
(Signed) ISAAC LEVY.
(Signed) JOHN STOFFELA.

TERRITORY OF ARIZONA, } ss:
County of Yuma, }

63 Isaac Levy and John Stoffela, being duly sworn, each for himself on oath and not one for the other deposes and says that he is a resident and freeholder or householder within the Territory of Arizona; that he is at least worth the amount for which he has become surety on the foregoing bond and above his just debts and liabilities, exclusive of property exempt from execution.

(Signed) ISAAC LEVY.
(Signed) JOHN STOFFELA.

Subscribed and sworn to before me this 12th day of November, A. D. 1896.

C. H. BRINLEY,
Clerk of the District Court, Third Judicial District, Territory of Arizona, County of Yuma.

I have fixed the probable amount of the costs of this suit, both of the appellate court and the court below, at one hundred dollars, and approve the foregoing bond this the 12th day of November, A. D. 1896.

C. H. BRINLEY,
Clerk of the District Court of said District of Yuma and Territory of Arizona.

64 A true copy as the same appears of file in my office.

Witness my hand and seal of said court this 16th day of November, A. D. 1896.

C. H. BRINLEY, *Clerk.*

TERRITORY OF ARIZONA, } ss:
County of Yuma, }

I, C. H. Brinley, clerk of the district court of the county of Yuma, Territory of Arizona, do certify that the foregoing 55 pages of printed matter contain a true, perfect, complete, and correct transcript of the record in the above cause, including true copies of all the original papers, the judgment-roll, record entries, and papers for appeal.

Witness my hand as such clerk and the seal of my office this — day of December, 1896.

C. H. BRINLEY, *Clerk.*

64½ In the Supreme Court of the Teritory of Arizona.

M. J. NUGENT, Superintendent of the Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT COMPANY, Appellee.

Be it remembered that on the 11th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, to wit:

It is ordered that this cause be set for hearing on Monday, January 18th, 1897.

Be it further remembered that on the 19th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

This cause came on to be heard on this day and was argued by the attorney general for appellant.

65 Whereupon a recess was taken by the court until two o'clock this afternoon. The court having reconvened after recess, further proceedings were had therein in said cause as follows, to wit:

In this cause argument resumed by Mr. Eugene S. Ives for appellee, and the argument ordered continued until tomorrow morning.

Be it further remembered that on the 20th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In this cause Mr. Ives resumed argument for appellee, and the attorney for appellant replied thereto, and cause was ordered submitted.

Be it further remembered that on the 26th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises—

It is ordered that the judgment of the lower court herein
66 be, and the same is hereby, affirmed; and it is further ordered and adjudged that the appellee herein recover against the appellant herein and Isaac Levy and John Stoffela, the sureties on the appeal bond herein, its costs incurred in this court, taxed at twenty-eight and $\frac{50}{100}$ dollars.

Be it further remembered that on the 10th day of March, 1897, appellant filed in said court in said cause a motion for rehearing, of which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

THE STATE OF ARIZONA IMPROVEMENT Co., Plaintiff & Defendant in Error,
vs.
M. J. NUGENT, Superintendent Territorial Prison, Defendant & Plaintiff in Error.

The defendant, M. J. Nugent, superintendent of the territorial prison, defendant in the court below and appellant herein, comes and moves the court for a rehearing in this cause for the following reasons:

First.

Because it is apparent, from the announcements made by the judges, or at least one of them, from the bench in rendering
67 the decision of affirmance herei n that the court overlooked the point made and pressed herein that this is an action to enforce the common-law rights of the plaintiff, all of which arise out of a simple contract, so called, by the extraordinary writ of mandamus, and none of which is required as a duty to plaintiff resulting from an office held by defendant.

It is further apparent that the court overlooked the fact that in the event that it be found that defendant was the proper party to this action, which was the decision, then it required a good and valid contract, one enforcible at law, and with mandamus as the proper remedy for it before even then this action could be maintained.

This statement is put for the reason that one of the judges announced from the bench that he did not know whether this was a good and valid contract or not, and therefore attention is called to the fact that, admitting that the action is properly brought and against the proper party, it would then become important to know that a good and valid contract was at the bottom of the action, because the action is founded upon it. Hence error is assigned hereon.

Second.

Because it appears that the court overlooked the fact that to enforce the said contract would be to require the defendant to
68 do an unlawful act—that is to say, that he would be required to impose penalties on the prisoners demanded that were not so imposed by the judgment of conviction rendered against them and which are nowhere authorized by the criminal laws of the Territory—that is to say, that he is required to impose the penalty of hard labor on them contrary to any law authorizing the same and contrary to the judgment of conviction rendered against them; hence error.

Third.

Because it seems apparent that the court overlooked the fact that the law authorizing the board of control to make the contract with reference to the letting and leasing territorial lands and prison labor fixes the maximum time for such lease at ten years from the date of the contract, when from the face of the contract itself provisions are made for its continuation *from* a period of fourteen years; hence error.

Fourth.

It is also apparent that the court overlooked the fact that the said law requires the said board to make all such leases of the territorial lands for either cash or for part of its proceeds, when the contract agrees on neither, but leaves to the option of the plaintiff which it shall be at some time in the future, and that time is nowhere fixed nor is it fixed which it shall be.

Fifth.

69 It also seems apparent that the court failed to consider the merits of the contract *of* the contract itself. It is apparent that the court failed to consider the facts:

1. That the said contract shows on its face that the obligations, all of them, specific and costly, are on the Territory and none of them on the plaintiff. Hence the unconscionable features of it *was* overlooked.

That the fact that the said plaintiff, while maintaining extensively that it was to excavate extensive canals, &c., is not bound by the terms of the said contract anywhere or in any part of it to build any canal at all, nor is it bound to excavate any part of one. It also seem- to have failed to consider the fact that all of the obligations and expenditures, which the plaintiff urged so much it was required to do, is not required of — in the contract at all, nor is any part of it therein required; that all of the requirements and obligations on which plaintiff so much dwelt are altogether absent from the provisions of the contract itself, and hence all such claims are outside of the record itself. It is also apparent that the fact that the consideration named in the contract is that which the contract itself shows that the plaintiff company has not and never will have unless at territorial expense and not plaintiff's, meaning water rights named in the said contract, and that no guaranty is provided that the Territory shall ever receive such consideration; that
70 there is no guaranty that any consideration whatever shall be received by the Territory from the hands and acts of the plaintiff.

Sixth.

Defendant insists that, as he is but the employee of the board of control and not the party to the contract or any part of it, and as the contracting party, to wit, the board of control, was the contracting party and the party to direct the execution of the said contract,

if to be executed at all, he is not the proper party defendant, and that the said board of control should have been sued and not him.

Therefore, all the premises being seen, defendant prays that he may have a rehearing in this action, and for the reversal originally demanded by the appeal herein, and for all general relief.

M. J. NUGENT,
Supt. Ter'l Prison,
By J. F. WILSON,
Attorney General.

(Endorsed:) 542. The Arizona Improvement Co. *vs.* M. J. Nugent, supt. Ter'l prison. Motion for rehearing. Filed March 10th, 1897. J. L. B. Alexander, clerk. J. F. Wilson, attorney general, for defendant and appellee.

71 Be it further remembered that on the 15th day of March, 1897, appellee filed its appearance to appellant's motion for rehearing, of which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Defendant and Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Plaintiff and Appellee.

The above-named appellee, The State of Arizona Improvement Company, having been served with a motion for rehearing in this cause, respectfully submits to the court—

That the grounds of said motion are the same matters that were urged by appellant's counsel in brief and oral argument, and, said matters having been fully considered and passed upon by the court, appellee asks that said motion for rehearing be denied; and appellee here now waives time and consents that said motion
72 may be heard, considered, and determined at the next sitting of the court, on the 16th day of March, 1897.

Dated Phœnix, Arizona, March 15th, 1897.

Respectfully submitted.

L. H. CHALMERS,
Attorneys for Appellee.

(Endorsed:) No. 542. In the supreme court of the Territory of Arizona. M. J. Nugent, defendant and appellant, *vs.* The State of Arizona Improvement Company, plaintiff and appellee. Appellee's appearance on motion for rehearing, waiver of time, and consent. Service of within acknowledged this 15th day of March, 1897. —— ——, attorney for appellant. Filed March 15th, 1897. J. L. B. Alexander, clerk.

Be it further remembered that on the 16th day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In this cause it is ordered that the motion for rehearing of
73 appellant filed herein be submitted.

Be it further remembered that on the 17th day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In this cause it is ordered that motion for rehearing filed herein by appellant be denied.

Whereupon the following further proceedings were had in said court in said cause on said last-mentioned day, to wit:

In this cause the attorney general in open court gave notice of appeal from the judgment of this court herein to the United States Supreme Court and moved the court to fix the amount of the appeal bond; whereupon it was ordered that the cost bond on appeal be fixed at the sum of one thousand dollars.

In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Superintendent Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Appellee.

74 J. F. Wilson, being duly sworn, says he is the attorney general of the Territory of Arizona and was the proper attorney of the appellant in the district court of the county of Yuma, in said Territory.

That *is* is acquainted with the value and the amount in dispute and controversy in this cause, described in the complaint of the plaintiff below, and that the value thereof is over five thousand dollars to the said Territory of Arizona, and that the full amount in controversy in this cause incurred upon the Territory of Arizona, exclusive of costs, is over five thousand dollars and is of the value of twenty thousand dollars or more.

That the same accrues or will accrue because of the fact that the additional expense and necessary outlay in the enforcement of the said contract required by the writ in this cause will amount to at least thirteen thousand dollars, exclusive of costs, and in addition to the present costs now incurred in maintaining the prisoners of said Territory.

Affiant further says that he is now aware that the record in said cause shows the value of said amount in this controversy, and this affidavit is made for the purpose of showing directly the value thereof, as the same is involved in this controversy, to be
75 above five thousand dollars, exclusive of costs, and for the purpose of perfecting an appeal of said cause to the Supreme Court of the United States and of showing to the said court that said court has jurisdiction of said cause on appeal so far as the value in controversy is concerned.

J. F. WILSON.

Subscribed and sworn to before me this 20th day of March, A. D. 1897.

[SEAL.] WILLIAM WILKERSON,
Deputy Clerk District Court, Fourth Judicial Dist., Yavapai County, Arizona.

(Endorsed:) No. 542. In the supreme court of the Territory of Arizona. M. J. Nugent, superintendent territorial prison, appellant, *vs.* The State of Arizona Improvement Co., appellee. Affidavit of value. Filed April 28th, 1897. J. L. B. Alexander, clerk.

76 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Superintendent Terri-al Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT Co., Appellee.

The above-named appellant, M. J. Nugent, superintendent of the territorial prison of the Territory of Arizona, conc*i*eving himself aggri-ved by the final judgment entered by the supreme court of Arizona on the 26th day of February, 1897, in the above-entitled cause, in which the judgment of the district court of the second judicial district of the Territory in and for the county of Yuma was affirmed, and in which said appellant was adjudged to be subject to deliver, on writ of mandamus, to appellee the convict labor of the said territorial prison, and in which peremptory writ was awarded to compel the said appellant to furnish to the State of Arizona Improvement Co. ten able-bodied convicts at Yuma on the 3d day of December, 1896, at 8 a. m., properly guarded, on the out-
77 side of the gate of the territorial prison at Yuma, in which judgment appellant, as defendant in the action in the court below, prayed judgment that the said plaintiff, The Arizona Improvement Co., take nothing by its said application, and that defendant go hence without day and recover his costs herein:

Therefore he hereby appeals from said judgment to the Supreme Court of the United States, and prays that his appeal may be allowed, and that a transcript of the record, proceedings, judgment, decision, and opinion in this cause be duly authenticated and sent to the Supreme Court of the United States.

J. F. WILSON,
Attorney General, Representing the Appellant in This Action.

And now, to wit, on the 20th day of March, 1897, the appeal prayed for in the foregoing petition is hereby allowed, with citation to issue on filing of bond in the penal sum of one thousand dollars, with two or more good sureties, approved by the presiding justice, the chief justice being disqualified, of the supreme court or any other associate justice sitting in said cause.

JNO. J. HAWKINS,
78 *Associate Justice of the Supreme Court, Presiding in the Aforesaid Hearing, the Same Being the Presid-Justice of the Supreme Court of the Territory of Arizona.*

(Endorsed:) No. 542. In the supreme court of the Territory of Arizona. M. J. Nugent, superintendent territorial prison, appellant, *vs.* The State of Arizona Improvement Co., appellee. Appeal. Filed April 28th, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the United States.

M. J. NUGENT, Defendant and Appellant,
vs.
THE ARIZONA IMPROVEMENT CO., Appellee. } Assignment of Errors.

The appellant in the above cause comes and makes the following assignment of errors alleged to have been committed by the supreme court of Arizona:

79 The supreme court of the Territory of Arizona, sitting as a court of appeals and reviewing the proceedings of the district court in this action, erred in finding that the district court did not err on the trial of the cause.

First. Erred in finding the law to be that the defendant's and appellant's demurrer in the court below was not well taken.

Erred in finding that mandamus would lie against the said defendant below and appellant herein, because he is but the servant of the board of control of the Territory of Arizona and not a party to the contract sought to be enforced in this action, when the said board of control was the party thereto and should have been moved against and not the defendant, the mere servant and employee of the said board.

Second. The said supreme court of Arizona erred in sustaining the judgment of the court below in holding that the said prisoners named in the contract sued on should be by the said defendant, as the superintendent of the said territorial prison, turned over to the said company and appellee herein as per their demand, because—

1. Such delivery would be to submit the said prisoners to the penalty of hard labor, when there was no judgment for such penalty ever rendered against them.

80 2. Because there is no law in the Territory of Arizona allowing any judgment of conviction to be rendered with the penalty of hard labor included therein as part of the penalty, either in the criminal code or elsewhere, and hence defendant and appellant herein is by the said judgment required to do an unlawful act toward the said prisoners—that is, to submit them in hard labor without any law for the punishment of crime in the Territory authorizing it and without any judgment being rendered against the said prisoners by the courts pronouncing the judgment of conviction against them to authorize it.

Third. The said supreme court of Arizona erred in sustaining the judgment of the court below and in holding that the contract sued on might be enforced by the extraordinary remedy of mandamus instead of by a direct action for that purpose against the parties to the contract instead of the employee of them.

2. Erred because the said plaintiff and appellee herein seeks to

equire the defendant and appellant to do an act—that is, to enforce private contract between others by mandamus—which the law oes not enjoin on him as a duty resulting from his said office, nd that the said judgment of the said supreme court of Arizona o held that the same might be and should be done. Hence error.

1 Fourth. The said supreme court erred in sustaining the judgment of the court below and, in doing it, holding that he said defendant and appellant herein should enforce the contract f others the doing of which would be to confer a special privilege n the said company by contract, which could not be done by law, nd therefore in violation of section 1889 of the organic act of the 'erritory of Arizona.

Fifth. The said supreme court erred in sustaining the judgment f the court below and in thereby holding that the plaintiff in the ction was entitled to coerce the action of the Territory by suing n mandamus, the employee of territorial agents without terri- orial consent and not the agents themselves.

Sixth. The said supreme court erred in holding that no error was ommitted by the court below and in sustaining its said judgment—

1. Because it imposed the penalty of hard labor on the said pris- ners without lawful authority, and therefore required defendant to o an unlawful act against them.

2. Because defendant was not the proper party to be sued in this ction.

3. Because the contractual right of the parties, being of a private nature, and all rights in the case, being purely contractual 2 and common-law rights, cannot lawfully be enforced by the extraordinary remedy of mandamus.

4. Because the said contract *used* on shows on its face that it is 'ithout consideration of any real kind, is contrary to public policy n taking prisoners from the prison and carrying them outside and broad at territorial expense, risk, and trouble and thus endanger- ng them to escapes without benefits, and is therefore unconscion- ble.

Seventh. The said supreme court erred in not reversing the case nd remanding the same back to the court below with directions to ustain defendant's demurrer to said cause and dismissing the same.

For all of which defendant prays a reversal, &c.

J. F. WILSON,
Attorney General of Arizona and Attorney Representing Appellant.

(Endorsed :) No. 542. M. J. Nugent, appellant, *vs.* The Arizona mprovement Co., appellee. Assignment of errors. Filed April 8th, 1897. J. L. B. Alexander, clerk.

83 In the Supreme Court of the Territory of Arizona.

M. J. NUGENT, Superintendent Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT COMPANY, Appellee.

Statement of facts by the supreme court of the Territory of Arizona, sitting as a court of appeals on the foregoing transcript on appeal from the district court on the second judicial district of Arizona in and for the county of Yuma, where the cause was tried without a jury and settled on demurrer and the pleadings in the cause, on which demurrer, pleadings, and exhibits the said district court rendered judgment, and the appellant rested on said demurrer and appealed.

The supreme court takes the facts found by the district court on the trial in that court as agreed to by the counsel for the respective parties as the facts in this cause and as the facts are shown by the record, and make such statement of facts as found in the
84 transcript the statement of facts in this case.

From such transcript, and from the same as the statement of facts, this court finds that the district court did not commit error in refusing to award the writ of mandamus and in — granting the writ, and that the errors assigned by appellant are not well taken as the same appears in the appellant's assignment of errors on appeal to the supreme court of Arizona.

The supreme court of the Territory of Arizona further finds that the judgment of the district court ought to be affirmed. Judgment of confirmation is therefore rendered, and the writ ordered by the court below is therefore directed.

March 20th, 1897,

The above statement is a true statement of the facts in this cause and the record herein.

JNO. J. HAWKINS,
Presiding Justice of the Supreme Court of the Territory of Arizona in this Cause, the Chief Justice Not Sitting.

85 (Endorsed:) No. 542. In the supreme court of the Territory of Arizona. M. J. Nugent, superintendent territorial prison, appellant, *vs.* The State of Arizona Improvement Co., appellee. Statement of facts. Filed April 28th, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the United States.

M. J. NUGENT, Superintendent Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Appellee.

Appeal Bond.

Know all men by these presents that we, M. J. Nugent, as principal, and L. J. Horton and B. A. Fickes, both of the county of

Maricopa, in the Territory of Arizona, being sureties for the said principal, are held and firmly bound to The State of Arizona
6 Improvement Company, appellee herein, in the sum of one thousand dollars, to be paid to said company, to its successors or assigns; — which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The conditions of the above obligation are such that the above-named appellant shall prosecute his appeal with effect, and if he fails to make his plea good, shall answer and pay all costs, then this bond shall be void; otherwise to remain in full force and effect.

Witness our hands this 20th day of April, 1897.

M. J. NUGENT,
By Attorney General.
L. J. HORTON.
B. A. FICKAS.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

On this the 20th day of April, 1897, personally appeared before me, the undersigned, a notary public of the county of Maricopa, in the Territory of Arizona, the above-named sureties on the above and foregoing bond, and upon oath each for himself and not one for the other states that he is a resident, citizen, and house-
87 holder in the said county and Territory, and that he is worth the sum of the said bond in property subject to execution over and above all of his liabilities and legal exemptions.

L. J. HORTON.
B. A. FICKAS.

Subscribed, sealed, and sworn to before me this the 20th day of April, 1897.

[SEAL.] CHAS. MOORE,
Notary Public.

Commission expires 14th May, 1897.

I, John J. Hawking, presiding justice at the hearing in the supreme court of Arizona of the above cause on appeal, hereby approve of the within bond and the sufficiency of the sureties thereto this the 20th day of April, A. D. 1897.

JNO. J. JAWKINS,
Presiding Justice of the Supreme Court of the Territory of Arizona in this Cause, the Chief Justice Not Sitting.

88 (Endorsed:) No. 542. M. J. Nugent, superintendent territorial prison, *vs.* The State of Arizona Improvement Company. Appeal bond. Filed May 11, 1897. J. L. B. Alexander, clerk.

89 In the Supreme Court of the United States.

M. J. NUGENT, Superintendent of Territorial Prison, Appellant,
vs.
THE STATE OF ARIZONA IMPROVEMENT CO., Appellee.
} Citation on Appeal.

To the State of Arizona Improvement Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2d Monday of October, 1897, pursuant to an appeal allowed by the supreme court of the Territory of Arizona and by Justice John J. Hawkins, presiding justice of said supreme court, the chief justice not presiding, on the 20th day of March, 1897, and said appeal being allowed by said presiding justice March 20th, 1897, from a judgment rendered by the said supreme court of the Territory of Arizona on the 26th day of February, 1897, in an action pending in said supreme court, wherein you *was* plaintiff, as in the court below, and appellee in the said supreme court, and the said M. J. Nugent, as superintendent of the territorial prison of the Territory of Arizona, was appellant, to show cause why that said judgment in your favor should not be set aside, reversed, corrected, and speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 28th day of April, 1897.

JNO. J. HAWKINS,
Presiding Justice of the Supreme Court of the Territory of Arizona, the Chief Justice Not Sitting.

Due service of the foregoing citation is hereby this day acknowledged.

This April 29th, 1897.

____ ____,
Attorney for The State — Arizona Improvement Company, Appellee in this Cause in the Supreme Court.

90 OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify and return that I have this day personally served this citation on the said defendant named herein, The State of Arizona Improvement Company, by delivering to Eugene S. Ives, president of said company, at Phœnix, Maricopa county, Arizona Territory, a true copy of this citation this 11th day of May, 1897.

Fees, $1.80.

L. H. ORME, *Sheriff*,
By H. C. ORME, *Deputy*.

[Endorsed:] M. J. Nugent, as superintendent of territorial prison, appellant, *vs.* The State of Arizona Improvement o., appellee. Citation on appeal. Lodged in my office this 11th ay of May, 1897. J. L. B. Alexander, clerk supreme court of Arina.

Endorsed on cover: Case No. 16,602. Arizona Territory supreme ourt. Term No., 119. M. J. Nugent, superintendent of the territoal prison of the Territory of Arizona, appellants, *vs.* The State of rizona Improvement Company. Filed June 3, 1897.

Supreme Court U. S.
FILED
DEC 23 1898
JAMES H. McKENNEY,
Clerk.

No. 119.

Brief of Payson for Appellant.

Supreme Court

OF THE UNITED STATES.

Filed Dec. 23, 1898.

OCTOBER TERM, 1898.

No. 119.

M. J. NUGENT, SUPERINTENDENT OF THE TERRITORIAL PRISON, OF THE TERRITORY OF ARIZONA
Defendant and appellant.
vs.
THE STATE OF ARIZONA IMPROVEMENT COMPANY,
Plaintiff and appellee.

Brief for Appellant.

CHARLES F. AINSWORTH,
Attorney General for Arizona,
and L. E. PAYSON,
of Counsel for Appellant.

1

IN THE

Supreme Court

OF THE UNITED STATES.

2 OCTOBER TERM, 1898.

THE STATE OF ARIZONA IMPROVEMENT COMPANY,
Plaintiff and appellee.
vs
M. J. NUGENT, SUPT. TERRITORIAL PRISON,
3 Defendant and appellant.

BRIEF FOR APPELLANT.

This action was commenced in the District Court of the Third Judicial District of Arizona in Yuma County by the appellee, The State of Arizona Improvement Company against the appellant, M. J. Nugent, as a Territorial officer, viz. Superintendent of the Territorial Prison, of

4 Arizona, to compel by mandamus the specific performance on the part of the Territory of Arizona, a certain contract, bearing date December 2nd, 1895; which had been entered into by and between the Territory of Arizona, through its officers the Board of Control and the appellee herein, said contract being set out in full in the record hereof at folios 7 to 26 inclusive.

The particular portion of the contract sought
5 to be enforced by these proceedings as alleged in appellee's petition, is that there be furnished the appellee ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded on the outside of the gate of the Territorial Prison. (Record folio 4, page 2.)

The trial court decided the case on the pleadings without the introduction of any evidence by either party, and granted the peremtory writ of mandamus, commanding and directing
6 M. J. Nugent, Superintendent of the Territorial Prison, to furnish the appellee ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded, on the outside of the gate of the Territorial Prison at Yuma. (Record folios 47 and 48, page 21.)

From this judgment an appeal was taken to the Supreme Court of the Territory and by that Court affirmed. (Record folios 64 ½ to 66,

page 28.)

The case now comes before this Court on appeal from the final decree of the Supreme Court of Arizona.

Before making a statement of case that the Court may understand the situation of the parties and their acts which lead up to this litigation, we herewith set out the Act of the Legislature under which the contract in controversy is alleged to have been made and the political changes in the chief executive of the Territory prior to the commencement of this action.

In 1895 the Legislature of Arizona passed what was known as the Board of Control Bill, being Act No. 19 of the 18th Legislative Assembly, approved March 8th, 1895, being as follows:

AN ACT. No. 19.

To create a Territorial Board of Control for the Charitable, Penal and Reformatory institutions, and making an appropriation therefor.

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. All Boards of Commission for the Insane Asylum, the Territorial Prison, and the Reform School, are hereby abolished, and shall go out of office and cease to discharge their respective duties on and after the passage of this Act.

10 SEC. 2. On and after the passage of this Act the Governor and Auditor of the Territory and one citizen who shall be appointed by the Governor with the advice and consent of the Council, and who shall hold his office for two years, and shall be ex-officio Secretary, shall constitute a Board of Control who shall have full charge of all charitable, penal and reformatory institutions that now exist in the Territory or that may hereafter be created; not more
11 than two members of said Board shall belong to the same political party.

SEC. 3. Said Board shall formulate rules for the governing of said institutions and shall purchase all supplies for the same, and all purchases exceeding one hundred dollars in amount shall be advertised for and let to the lowest responsible bidder; provided, that in cases of emergency private purchases may be made not exceeding in amount one hundred dollars for
12 any one institution.

SEC. 4. The Governor shall be allowed no compensation for any services rendered as a member of the Board of Control. The other member of said Board provided for in this act shall receive a salary of eighteen hundred dollars per annum and actual traveling expenses incurred in the discharge of his duties, to be paid quarterly out of the Treasury and he shall

devote his whole time to the discharge of the duties devolved upon him by this Act; provided, that before entering upon the duties of his office he shall give a good and sufficient bond in the sum of ten thousand dollars conditioned on the faithful discharge of his duties, such bond to be approved by the Governor. All bills for salary, clerk hire and expenses shall be paid quarterly, and it is hereby made the duty of the Auditor to audit said claim and draw a warrant on the Treasury for the same.

SEC. 5. The Auditor shall hereafter receive a salary of eighteen hundred dollars per annum and actual traveling expenses while in the discharge of his duties, which shall be in full for his services as Auditor and member of the Board of Control.

SEC. 6. Said Board shall be provided with an office at the Capitol of the Territory, which shall be in the Auditor's office and shall hold thereat regular meetings at least once in each month for the transaction of business, and shall be furnished with all necessary furniture and stationery, and all necessary blanks and blank books for the proper discharge of their duties not to exceed two hundred and fifty dollars per annum. Said Board shall make a full and detailed report of the expenses of each separate

institution to the Governor together with an itemized statement of individual expenses incurred while in discharge of their several duties as members of said Board, on or before the 31st day of December in each year, who shall lay the same before the Legislature at its next session, together with an approximate estimate of the cost of maintaining each separate institution for the then ensuing two years. Said Board shall also have the power to appoint a Clerk for the said Board of Control who shall receive a salary of seventy-five dollars ($75) per month.

SEC. 7. All accounts for clerk hire, salary and disbursements provided for in this Act shall be rendered under oath, and audited and allowed by the Board and paid on an order of the Auditor, drawn on the Treasurer at the end of each quarter.

SEC. 8. All powers and duties now devolved on any of the various Boards for the government of the Insane Asylum, Territorial Prison and Reform School, or required to be performed by them under existing laws, are hereby conferred upon the Board of Control created by this Act, and it is hereby made the duty of the Board of Control, created by this Act, to perform all duties required of said Board by existing laws and also to visit all the institutions hereby placed under their control at least once

every three months, and make a thorough inspection thereof, and from time to time formulate such rules and regulations for the government of the same, as they may deem advisable.

SEC. 9. Said Board of Control after qualifying and entering upon their duties, shall have full control over the Territorial Insane Asylum, the Territorial Reform School and Territorial Prison, together with all properties, buildings and lands belonging thereto or that may hereafter be acquired. Sixty days after the passage of this Act they shall have the power and authority to enter into an agreement or agreements with a responsible person or persons, to lease on shares or for cash the property, buildings and lands or any part thereof now belonging to the Territory, wherever said buildings and lands may be located, or that may hereafter be acquired for the purpose of furnishing employment for the inmates of the said Territorial Prison and the said Territorial Reform School. The said Board shall have the authority to contract with responsible person or persons, to furnish the labor of the inmates now within the said Reform School or said Prison, or that may hereafter be confined therein, or any number of them, for the best interests of the Territory; provided, however, that at no time shall the

labor of the inmates of the said Territorial Prison or Territorial Reform School be leased to any person or persons when the labor of the inmates of said institution is required upon any building or properties of the aforesaid institutions, and no lease or contract shall be made that will obligate the Territory to furnish tools, machinery or money, or make other expenditure other than the labor of the inmates, properly clothed and fed, and the proper guards for same, together with the use of the property, buildings and lands heretofore mentioned: provided, that no contract or lease shall be made to extend for a term of more than ten (10) years from the time of making said lease or contract. And the said Board may contract to allow such labor to be performed at any place either inside or outside the prison walls or the confines of the Reform School, but if a contract be made to allow labor to be performed outside of the prison walls or confines of the Reform School, it must be done under proper restrictions, having regard for the safety of the prisoners or inmates. A good and sufficient bond must be given by the person or persons leasing the labor of inmates of the aforesaid institutions for the faithful performance of such contract: said bond to be approved by the Board of Control.

SEC. 10. A sum of money sufficient to carry

out the provisions of this Act is hereby annually
25 appropriated out of the General Fund.

SEC. 11. All Acts and parts of Acts contravening or conflicting with the provisions of this Act are hereby repealed.

SEC. 12. This Act shall take effect and be in force from and after its passage.

A. J. DORAN, President. J. H. CARPENTER, Speaker.

Approved this 8th day of March, 1895.

26 LOUIS C. HUGHES, Governor.

That thereafter, The Territory of Arizona on December 2nd, 1895, through its Board of Control, entered into the contract with appellee, set out in the record at folios 7 to 26 inclusive, and by the terms of which the Territory of Arizona attempted to lease to the appellee herein, 2115 acres of land, also all the labor of the male convicts, then in the Territorial penitentiary, or which may thereafter be confined therein, for the term of ten years from the date of said contract and lease, said appellees to have the exclusive control of the labor of the convicts in the Territorial Prison from 8 o'clock a. m. to 5 o'clock p. m. during said term of ten years, Sundays and legal holidays excepted, the Territory to furnish said convict labor to the appellees herein whenever and wherever

27

designated by said appellees in Yuma County, Arizona, properly guarded, clothed and fed, ready to commence work at the hours and terms above mentioned. Also to guard said convicts during the hours of labor, the Territory guaranteeing that said convicts shall perform good days labor while working to the satisfaction of the appellees herein, also when the work required to be performed should be too great a distance from the prison to admit the convicts returning to the prison at night, then they were to be guarded near the work by the Territory, and to furnish such convicts in such numbers, not less than five as might be required by the appellees herein from time to time. It being provided that the lease for the land should not commence until water should be conducted on the lands of the Territory so leased by the canal of the appellee, provided that said lease should commence to run within four years from its date. It was also expressly understood and agreed that the continuance and maintenance of said contract by the Territory during its entire term should be of the essence thereof, and that the right and privileges which accrue to the Territory thereunder, should be subject to and contingent upon its full, entire, faithful performance and should be forfeited and defeasible in the event of any substantial, per-

sistent or wilful breach thereof. That the
31 rental for the lands should be paid for in cash to be thereafter determined, or by one half the annual crops raised thereon at the option of the appellee herein: the convict labor to be paid for at the rate of seventy (70) cents per day payable in water rights in the canal, when such canal should be completed, at the rate of $20 per acre, said water right to be in the form when issued as set out in Exhibit "A," Record folios
32 17 to 25 inclusive, that as soon as $1,600 had been earned by said convict labor at 70 cents per day water right certificates convertable into water right deeds should be issued in form as per Exhibit "B." (Folio 26, page 11. Record.)

Appellee in no way agreeing to do anything on its part except as above set forth. After the execution of the contract aforesaid, there was a change in the Governor of Arizona, Gov. Franklin succeeding Gov. Hughes, and on April 22nd
33 1896 the time for commencing work on the aforesaid contract was extanded until June 10, 1896. (Record page 8.) Since which time all of the Territorial officers have been changed including the Superintendent of the Territorial Prison. It was during the administration of Governor Franklin that this action was commenced, it being his orders and direction that the Territory should not enter upon the per-

formance of said contract on its part for reasons
34 that will hereafter more fully appear. Hence this action at the very outset to compel specific performance on the part of the Territory.

STATEMENT OF THE CASE.

The first issue in this case arose upon the demur of the defendant and appellant herein to the complaint and petition of the plaintiff.

The petition of the complainants, The State of Arizona Improvement Company, alleged that
35 it was a corporation duly organized, and existing under the laws of the Territory of Arizona and that the defendant, M. J. Nugent was a resident of Yuma, Arizona and was the Superintendent of the Territorial Prison at Yuma, Arizona.

That he had full charge and control of persons confined in said prison subject only to the Board of Control of the Territory.

That the complainants entered into a contract
36 about Dec. 2nd, 1895, with the Territory of Arizona through its Board of Control.

That on the —— day of April, 1896 they entered into a supplemental contract with said Territory through its Board of Control, which contract and supplemental contract were set out as Exhibits "A," and made a part of the complaint.

Alleges that the Board of Control had

authority to make the contract on behalf of the
37 Territory.

That on the 2th day of May, 1896 the complainants made a demand in writing on N. J. Nugent, Superintendent of the Territorial Prison aforesaid in pursuance of said contract, to furnish to complainants on the 2nd day of June, 1896 at 8 a. m. ten able bodied male convicts out of the Territorial Prison at Yuma, properly guarded, on the outside of the gate of
38 the Territorial Prison at Yuma.

That on the 26th day of May, 1896 said M. J. Nugent served written notice on the complainant, peremtorily declining to furnish said convict labor at the time and place or at any time and place.

And alleging further that the complainant had no plain, speedy or adequate remedy in the ordinary course of law. (Record, folios 4 to 26 inclusive.)

39 To the foregoing petition the defendant and appellant demurred for the following reasons:

1. That said petilion and the exhibits thereto failed to state facts sufficient to authorize the writ of mandamus to issued herein.

2. That the petition seeks to compel the performance of an act on the part of the appellant which the law does not especially enjoin upon the appellant as a duty resulting from his

40 office.

3. That the petition seeks only to compel the performance of a contract on the part of the appellant.

4. That said petition seeks to compel the performance of a void contract. [Record, folio 30.]

This demur in accordance with the practice in Arizona concluded with the answer of appellant,
41 all of which was filed at one and the same time.

The answer of the appellant among other things alleged want of proper parties defendant; want of power in the Territory to hire out the convicts confined in the Territorial Prison, that had not been sentenced as a part of their punishment to hard labor, or to authorize convicts to be taken out and away from the Territorial Prison where punishment and sentence was by
42 confinement in said prison; want of power in the Board of Control to make the contract sought to be enforced; want of consideration to the Territory for said contract. That the contract sought to be enforced against the Territory is in violation of the Act of March 8th, 1895 in that said contract is for a period of over ten years, and takes the entire convict labor for that period, in violation of the provision in said act providing that said labor should not be leased

out when the same should be needed to work on
43 the buildings and premises of the Territory, thereby taking away from the Territory any right to said labor within the period of ten years. That the contract was against public policy in authorizing all the prisoners to be taken from the Prison and remain away from said Prison in many cases for the entire period of their sentence.

That the appellant, M. J. Nugent is a Terri-
44 torial officer subordinate to the will and direction of the Governor of the Territory, and that as such officer he was directed and commanded by his superior, B. J. Franklin as Governor of the Territory of Arizona, not to deliver to the appellee any prisoners out of the Territorial Prison [Record folio 44.] Alleges that the contract if enforced would increase the Thrritorial indebtedness in excess of one per cent on the taxable property of the Territory and therefore
45 in violation of the organic act, that the enforcement of said contract would interfere with the executive perogative of the Governor of the Territory and prevent the enforcement and exercise of the same and therefore void.

Alleged that the appellant had not before the commencement of this suit executed a sufficient bond or any bond for the faithful performance of said contract on its part as provided by said

Act 19. [Record page 20.]

46 On Nov. 9, 1896 after hearing, the demur of the defendant and appellant herein was overruled by the District Court, said defendant duly excepting, and the Court without any evidence being given on either side other than the pleadings, entered judgment for the complainant, and ordered, adjudged and decreed that the plaintiff had no plain, speedy or adequate remedy at law and was entitled to the writ of
47 mandamus to compel its admission to the use and enjoyments of its rights to the convict labor as by the terms of the contract set out in the complaint.

That the peremtory writ of mandamus issue, commanding and directing M. J. Nugent, Superintendent of the Territorial Prison to furnish the complainant ten able bodied male convicts out of the Territorial Prison at Yuma, on the 3rd day of Dec. 1896 at 8 o'clock a. m., properly
48 guarded, on the outside of the gate of the Territorial Prison at Yuma.

And further ordered, adjudged and decreed that the plaintiff have lief to apply at the foot of said decree, for such further writ of mandamus for other and further relief as might be meet or just in the premises. (Record, page 21, folios 47-48.)

On appeal to the Supreme Court of the Ter-

ritory of Arizona the order and decree of the
49 District Court over-ruling said demur and granting the writ of mandamus herein before stated was affirmed by final decree of said Court, and entered herein on the 26th day of January, 1897. (Record, page 28, folios 65 to 66.)

"B."

The se ond issue to be considered arises on the judgment of the District Court of the Third Judicial District of Arizona in rendering
50 judgment in favor of the complainant against the appellant herein on the answer of the appellant, which was a return to the alternative writ of mandamus, and for the purposes of this suit must be taken to be true.

SPECIFICATION OF ERRORS.

The errors of the Supreme Court of the Territory of Arizona asserted by the appellant and now intended to be urged are as follows:

1. That the said Supreme Court erred in
51 holding that it had jurisdiction of the subject matter or of the appellant herein and in affirming the decree of the District Court of the Third Judicial District of the Territory of Arizona, entered in this cause on the 9th day of Nov. 1896 for the reason, hat it appears upon the face of the pleadings that said District Court did not have jurisdiction of the subject matter or of the defendant now appellant to said action.

52 2. That said Supreme Court erred in refusing to sustain the exception taken by the appellant to the errors of said District Court, duly and properly signed in said Supreme Court, in holding that the said complainant could by mandamus or any other form of action bring suit against the Territory of Arizona without the consent or permission of said Territory, to bring such action. It being apparent that upon the face of the pleadings and the record in this case that said action, although nominally 53 against M. J. Nugent as Superintendent of the Territorial Prison of the Territory of Arizona, is in law and in fact a suit against the Territory itself.

3. That the said Supreme Court erred in not sustaining the demur of the appellant to the complaint of appellee herein and directing the Court below to dismiss said action.

4. Said Supreme Court of Arizona erred in 54 sustaining the judgment of the Court below and in holding that the contract sued on might be enforced against the Territory by mandamus without its consent to bring such action.

5. That the Supreme Court of Arizona erred in sustaining the judgment of the Court below and in holding that a mandamus would issue against the Territory to compel the specific performance of an executory private contract,

entered into between the Territory on the one
55 side and a private corporation on the o her.

6. That the said Supreme Court erred in sustaining the judgment of the Court below and in holding that the contract set out in the com-plaint shall be enforced by mandamus, enforcement of which would be to confer a special privilege on said corporation by contract, which could not be done by act of the Legislature, and therefore in violation of section 1889 of the organic act of the Territory of Arizona.

56 7. That the said Supreme Court erred in sustaining the judgment of the Court below and in thereby holding that the complainant in this action was entitled to coerce the Territory of Arizona into the performance of its contract, wherein the executive branch of the Government had declared said contract to be illegal and void, and directed its officers not to perform the same.

57 8. That said Supreme Court of Arizona erred in sustaining the judgment of the Court below in holding that the said prisoners named in the contract sued on, should be by the said defendant as the Superintendent of said Territorial Prison, turned over to the appellee herein as per its demand for the reason.

That such delivery would be to submit the said prisoners to the penalty of hard labor, when there was no judgment of such penalty

58 ever rendered against them.

Because there is no law in the Territory of Arizona, allowing any judgment of conviction to be rendered with a penalty of hard labor included therein as a part of the penalty, either in the criminal code or elsewhere, and hence appellant herein is by said judgment required to do an unlawful act toward the said prisoners in submitting them to hard labor without any law for the punishment of crime in the Territory
59 authorizing it; and without any judgment being rendered against said prisoners by the Court pronouncing the judgment of conviction against them to authorize it.

9. That said Supreme Court erred in holding that no error was committed by the Court below and sustaining its said judgment. Because it required the appellant to do an unlawful act by imposing penalty of hard labor on Territorial prisoners without lawful authority.

60 And because the contractional right of the parties to this action being of a private nature and all rights in the case sought to be enforced being purely contractional, the writ of mandamus cannot be used to enforce the specific performance of such contract, and because further that said contract shows upon its face that it was without consideration and in violation of act No. 19 aforesaid of the Terri-

torial Legislature of Arizona in the year 1895,
61 and that said contract was against public policy in taking prisoners from the prison and conveying them outside and abroad at Territorial expense, risk and trouble and thus endangering them to escape.

10. That the Supreme Court erred in holding that said contract set out in the complaint could be enforced by mandamus against the Territory without its consent, when it appears
62 upon the face of the contract itself, that the said Territory of Arizona had the right by refusing to comply with the terms of said contract to nulify and void the same.

11. That the said Supreme Court erred in not reversing the judgment of the Court below and remanding the same back to the Court below with direction to dismiss said action.

ARGUMENT.

We shall endeavor to discuss the issues in
63 this case separately in the order in which they naturally arise, noting the pertinent assignments of error. The argument will be divided under the following heads:

1. The errors of the trial and Supreme Court of the Territory in holding they had jurisdiction of the subject matter and of the person of appellant, the Territory of Arizona, without its consent.

64 2. Errors of the trial and Supreme Court of the Territory of Arizona in over-ruling the demur of the defendant, now appellant.

3. The errors of the trial and Supreme Court of the Territory in granting relief to the plaintiff now appellee and in refusing to dismiss this action against the appellant.

I.

65 The ruling by the Supreme and Territorial Court that they had jurisdiction over the subject matter and the person of the defendant and appellant herein. (Errors 1 and 2:)

A.

66 The first question which arises in this contention is who was the real party, defendant in the court below and appellant herein. Is it M. J. Nugent in his individual capacity or in his representative capacity as the Superintendent of the Territorial Prison of Arizona? The complaint alleges that as such Superintendent he has full charge and control of the prisoners confined in the Territorial Prison, subject only to the Board of Control of the Territory, and the action is to compel him as such Territorial Superintendent to deliver to the appellee ten able bodied convicts in accordance with their demand under their contract. (Record folios 4 and 5, page 2.)

67 It seems clear from the pleadings and the record that the action is against M. J. Nugent in his representative capacity and not in his individual capacity. It being against him as a Territorial officer, the action then is against the Territory through its officer, M. J. Nugent as Superintendent of the Prison. In other words, the appellee is trying to compel the Territory through its subordinate officers to perform its contract, in place of compelling the officer
68 through the Territory to specifically perform the same.

It is manifest upon this record that M. J. Nugent has no individual interest in the controversy, and that any relief sought against him in this action is only against him in his official capacity as the representative of the Territory, and that the Territory alone is to be affected by the judgment or decree which may be rendered herein.

69 If the Territory is not the real party to this action there is no party against whom the decree can be made. No person in his natural capacity is brought before the court as the defendant.

We therefore submit, that the Territory cannot be sued without its consent, and its consent having never been given in this action in any manner whatever, both the trial court and the

70 Supreme Court was without jurisdictien as to the real party appellant herein, namely, the Territory of Arizona, and for that reason had no authority whatever to enter the judgment rendered herein.

People vs. Dulany, 96 Ill. 503 on 511 and 512.

Cunningham vs. Macon & Brunswick R. R. Co., 109 U. S. 446.

In re Ayres 123 U. S. 443 and cases
71 there cited.

Hans vs. Louisiana, 134 U. S. 1 and cases there cited.

This is not a new question in this Court as was said in a former decision.

The failure of States of the Union to pay their debts and discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no state can be sued in the ordinary courts as a
72 defendant, except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations and contracts by judicial proceedings to which the State is not made a party.

IN RE AYRES, supra, page 489 the Court used the following language which is quite appropriate to the case at hand: "According to Cunningham vs. Macon and Brunswick Rail-

road Company, 109 U. S. 446 it was decided
73 that, in those cases where it is clearly seen upon the record that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is that where it is manifest upon the face of the record that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State,
74 it alone is to be effected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction." The very question was presented in the case of New Hampshire vs. Louisiana and New York vs. Louisiana, 108, U. S. 76. In each of these cases there was upon the face of the record nominally a controversy between two States, which according to the
75 terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this Court: but on examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individuals citizens thereof, who had transferred their

76 claims to the State for the purposes of suit. It was accordingly unanimously held by this Court, that it would look behind and through the nominal parties on the record to ascertain who were the real parties to the suit.

The relief asked will require the officer against whom the process is issued to act contrary to the positive orders of the supreme political power of the Territory, whose creature he is, and to which he is ultimately responsible in law for what he does.

77 The Superintendent of Prison must under this order use the labor of the prisoners under his control in one way, when the supreme power of the Territory has directed him to use them in another.

The remedy sought in these proceedings to be complete would require the court to assume all the executive authority of the Territory so far as it related to the enforcement of this order

78 and to supervise the conduct of all persons charged with an official duty, in respect to the guarding and taking charge of the prisoners during the time they were required by the appellee, outside of the prison walls, and this too, in a proceeding in which the Territory is not, according the contention of the appellee, made a party.

It seems to us it needs no argument to show that the political power of the Territory cannot

thus be ousted of its jurisdiction and the judiciary set in its place.

And this was the conclusion arrived at by this Court in a case involving substantially the same questions: Hagood vs Southern, 117 U. S. page 52, on pages 67 and 68.

It is well settled law, both in England and this country that a writ of mandamus will not run against the sovereign. The reasons assigned by the English courts are that it is incongruous for the sovereign to command himself to do an act, and because in case of disobedience, the command of the writ is enforced by attachment of the person. In America the same conclusion is reached, but the reason therefor, is that because no suit can be brought against a State or Territory unless it consents thereto.

Merrill on Mandamus, section 89.

Ottawa Co. (Supervisors) vs. Auditor Gen. 69 Mich. I.

People vs. Dulaney, 96 Ill. 503 on 210-212.

II.

The rulings of the Trial and Supreme Court of the Territory in over-ruling the demur of the defendant and appellee herein. (Errors 3, 4, 5 and 7.)

It is manifest upon the face of the complaint

82 that this is an attempt on the part of the appellee to compel the Territory by mandamus to specifically peform the contract set out in the complaint by compelling the Territory, through its Superintendent of Prisons to turn out of the Territorial Prison and deliver to the appellee, prisoners from time to time confined therein as by said appellee demanded.

We think it clear that the action cannot be maintained against the Territory. The
83 judiciary cannot be brought in conflict with the executive branch of the government of the Territory and the reason is manifest. The judiciary cannot compel compliance with its orders and decrees whenever they conflict with orders of the executive. The present case is a good example of this doctrine.

Here is an order compelling the Superintendent of the Prison to turn out these prisoners to the appellee, yet the appellee has no power to
84 obtain possession of the prisoners as long as the executive refuses. The Court may bring before it the officer and commit him for contempt of Court, for not obeying his mandate, whereupon the executive can immediately pardon him, and thus even prevent a punishment.

It is the universal rule that the executive branch of the government cannot be interferred with by any decrees or judgments made by the judiciary.

85 Mandamus can never be used to compel the executive in the exercise of any of the powers entrusted to him as such, whatever the degree or character of the discretion imposed upon him. The executive and judiciary departments have seperate and distinct functions, clearly marked out, and each is independent of the other. Mandamus should never issue unless it can be enforced, for without the means of enforcement the writ would be futile.

86 B.

Mandamus cannot issue in a case where its effec· is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.

United States vs. Blaine, 139 U. S. 306.

United States vs. Windom, 137 U. S. 636.

87 It is apparent upon the face of the complaint that the Governor in carrying out the contract which is set out in the complaint would necessarily be required to exercise discretion and judgment. He would be required to construe the contract, and if he should decide that certain provisions therein contained, were in conflict with Act 19, Laws of 1895, being the Act authorizing the hiring of the convict labor, or in conflict with the organic, or statute laws of the Territory, then it would be his province and

88 duty to disregard all such provisions. He would be required through his proper officers to determine from time to time, what prisoners in the Territorial Prison were required to perform labor upon any buildings or grounds of the Territory, including the prison buildings; while under the contract all the prison labor is leased, being in direct conflict with Section 9 of the Act aforesaid. He would also be required to determine whether the appellees had given a good
89 and sufficient bond for the faithful performance of the contract. Also whether they had given any bond, notwithstanding a recitation in the contract that such a bond had been given.

He would be required to determine whether the appellee had complied with all the terms of the contract, conceding the contract to be valid, before turning the prisoners over to them when requested, and he having exercised this discretion, and judgment in refusing to turn out
90 the prisoners, and so notified his subordinate officer, his discretion and judgment cannot be interfered with by writ of mandamus or other proceeding on the part of the judiciary.

> In Butterworth vs. Hoe, 112 U. S. 50 on 54 this court said: "For mandamus evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do"

C.

91 Mandamus cannot be used to compel the State or Territory to fulfill its contract.

Section 2335, Revised Statutes of Arizona 1887, page 410 reads as follows: "The writ of mandamus may be issued by the Supreme or District court to any inferior tribunal corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from the office, trust or station; 92 or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal corporation, board or person."

Section 2336 reads: "This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law, and shall be issued on affidavit on the application of the party beneficially in- 93 terested."

It is clear from the reading of the above statute that this is substantially a re-enactment of the common law. In many of the States of this Union a similar statute has been enacted and the Courts have universally held that the writ of mandamus is limited and the sphere of its operation closely restricted by statute. That where statutes on the subject of mandamus,

94 similar to the one above referred to are in effect, the courts of the different States have as a rule held that mandamus is not a proper remedy to compel the specific performance of a contract.

In the case at bar there is no obligation upon the Superintendent of the Territorial Prison to turn out of the prison to any person whatever, any of the prisoners confined therein. The right to deliver to the appellee any prisoners contained in the Territorial Prison is given, if
95 at all, by virtue of the contract set out in the petition. There is no duty specially enjoined by law resulting from an office, trust or station, requiring the Superintendent of the Prison to comply with the request as made by the appellee. The precise question involved in this controversy has been before the Courts of different States upon similar statutes and their decisions have been uniform that the writ could not be allowed

96

State of Ohio vs. The Zanesville and Maysville Turnpike Co., 16 Ohio. State R 308 on 317.

People vs. Dulaney, 96 Ill. 503 on 510 and 512.

State vs. Republican River Bridge Co. 20 Kas. 404.

State vs. New Orleans etc R. R. 37 La. An 589.

97 To the same purport is the decision In re Ayres 123 U. S. 443 on 503.

In People vs Dulaney supra court says on page 511: "Concerning the contract of December 23, 1878, it may be said it was not so fairly obtained as that the commissioners ought to perform it. It was not made in conformity with the statute which prescribes the mode of letting convict labor, and, as we have before stated our views on this branch of the case, it will not be necessary to re-state the reasoning that led
98 to that conclusion.

"But there is another and equally conclusive reason why the peremptory writ should be denied in this case, and that is, this court has no jurisdiction by mandamus to compel the performance of executory contracts. It is an appropriate remedy to compel public officers to perform specific duties imposed by law; but that is not the case here. The duties which relator
99 asks to have the commissioner compelled to discharge arises out of the alleged contract with them. But for the alleged contract it is not claimed the commissioners owe relator any duties to be performed. It is only practicable by mandamus to compel the performance of specific acts where the duty to discharge them is clear and well defined, and when no element of discretion is involved in the performance. In the case at hand the duties to be coerced, if this

100 writ is allowed, arises out of a contract that requires a series of years for its performance, and must of necessity involve in some degree the exercise of discretion, or what is the same thing, judgment in the management of the business to which the contract refers. In such cases mandamus is not an appropriate remedy."

This case is in all respects identical with the case at bar. It was an attempt to compel specific performance of a contract for prison
101 labor similar to the one involved in this case, and we submit that the decision of the Supreme Court of the Territory should have followed this case and reversed the decision of the District Court.

III.

The decision of the District and Supreme Courts of the Territory in sustaining appellee's petition and granting the wri of mandamus on the merits. (Errors 6, 8, 9, 10, 11.)

102 The Supreme Court of the Territory so far as we are advised wrote no opinion in this case, therefore, we are not aware by what process of reason they arrived at their decision.

We will discuss this contract and endeavor to point out some of the reasons why, in our judgment, the contract is illegal and void as against the Territory (although we are mindful of the fact that mandamus is not the proper proceed-

ing to try such questions.)

103 The only authority on the part of the Territory of Arizona to make this contract is contained in Act 19, Laws of 1895 above referred to. This statute defining the duties of the Board of Control is a limitation upon the powers they may rightfully exercise. It being declaratory, as to the manner of making contracts by these offices for that purpose, it is to be considered as an inhibition on such offices as to the making of
104 such contracts, in any other manner or mode and for any other period or time, or for any other purposes than in such Acts designated, and if the contract in question contains provisions or is for a different length of time than that authorized in the Act, then the contract is without sanction of law and is not binding upon the Territory.

Section 9 of the Act aforesaid provides among other things that the inmates of the Territorial
105 Prison shall not be leased when the labor of said inmates is required upon any buildings or properties of the aforesaid institution.

One of the very first provisions in the contract is that all the labor of the male convicts now in the Territorial Penitentiary or who may hereafter be confined therein, are leased to the appellee for the term of ten years from date of said contract. (Page 4 of the record.)

106 This is clearly in violation of the provisions of Section 9 aforesaid, for the reason that it cannot be determined by the Territory, that for the ten years none of the labor of the Territorial Prisoners shall ever be needed or required upon any of the buildings or properties of the Territory, yet this contract seeks to put it beyond the power of the Territory to ever have the use of such labor upon any of its property during that period.

107 This contract also attempts to, and does in fact, lease all of the male convicts now in the Territorial Prison to the appellee for ten years irrespective of their sentence, whether it be for a shorter or a longer time than that specified in the contract. This clearly is beyond the power of the Territory to lease convict labor of the Territory for a longer period than that for which the prisoners are sentenced.

108 (Section 9 of the Act aforesaid authorizes the making of contracts or lease not exceeding ten years from the date of their execution, while the contract in question is for a period of ten years from the time when the appellee may complete the construction of its canal and turn water upon the lands of the Territory, the commencement of which shall not be to exceed four years from the date of making the contract. In other words the contract in terms is for a longer

period than ten years and is therefore void for
109 that reason.)

The provisions in the contract which authorize and permit the Territorial prisoners that were confined in the Prison at the date of making of said contract, and prior to the passage of Act 19 aforesaid, to be taken from the Prison to a great distance from the Prison so as to prevent the return of the convicts at night and there working them at hard labor, we submit,
110 is clearly an Ex Post Facto law and submits the prisoners then sentenced to imprisonment in the Penitentiary, to other and different punishment than that for which they had been sentenced or could have been sentenced at the time of the commission of the crime for which they were sentenced, and so far as that provision is contained it is clearly void.

In King vs. Missouri, 107 U. S. page 221 this Court held: "That any law passed after
111 the commission of and offense which, in relation to that offense or its consequences, alter the situation of the party to his disadvantage, is an Ex Post Facto law," and void.

To the same offect is the case IN RE Medley, 134 U. S. page 160.

It is also expressly provided in Act 19 aforesaid that a good and sufficient bond must be given by the person or persons leasing the labor

112 of the convicts of said Territory for the faithful performance of said contract, said bond to be approved by the Board of Control.

This contract on its face recites: "That the appellee herein having submitted his good and sufficient bond for the faithful performance of this contract, which bond has been approved by the said Board of Control and each of its members, is herewith delivered and accepted."

113 This precise question was raised by the pleadings that no bond whatever had ever been given. And it was taken, as we understand the matter, for granted that no bond had been filed. This however, is the fact and at the present time no bond has been given.

Why this provision should have been incorporated in this contract we are at a loss to know, unless the contract was prepared with the intention of submitting a bond prior to its execution.

114 It is apparent from the reading of this contract that all the provisions, so far as binding the Territory to perform the acts by it to be performed are mandatory as against the Territory, but no provision is contained as binding whatever on the appellees to do or perform any act.

Shortly after the making of this contract by the Governor of the Territory, it appears upon the record that another Governor was appointed

in his place, namely Gov. Franklin, and he is
115 the Executive who refused to carry out the provisions of this contract, or in any way consider it binding upon the Territory.

The contention on the part of the Territory is that there is no consideration whatever for the contract and that it is such a contract as would not be enforced in equity between individuals and is clearly within the decision of People vs. Dulaney, 96 Ill. 503 on 510.

116 A contract which authorizes the appellee to take out five convicts at a time and to take them at a great distance from the Territorial Prison and there be guarded, kept and maintained, for the purpose of doing work under the direction of the appellee would, of itself, create an extra and additional expense, to guard and provide for these prisoners while doing this work, more than the income to be received therefrom, even if this income was to be paid to the Territory in
117 money, but there is no provision in the contract by which the appellee ever agreed to pay anything for this labor. The nearest they come to making any stipulation is that they will pay seventy cents per day for each day's labor, and pay for it in water rights at the rate of $20 per acre when a proposed canal by them to be hereafter built shall be completed, but no agreement or statement or stipulation that they will ever

enter upon the construction of the said canal or ever complete it.

The Territory also claims that they have the right to forfeit this contract under the provisions contained on page 6, folio 13 of the record, where it is provided that the continuance and maintainance of this contract by the party of the first part, meaning the Territory or its successors, during its entire term, is of the essence thereof, and that the right and privileges which acrue to the Territory hereunder, should be subject to and contingent upon its full, entire, faithful performance, and shall be forfeited and defeasible in the event of any substantial, persistent or wilful breach thereof.

The Territory therefore contends that it had the right at any time to refuse to carry out the contract by forfeiting all rights which might acrue to it by the performance of the same, and thereupon the contract ceased and determined, the Territory having elected to terminate the contract before anything had been done on its part, the asme became and was thereafter of no validity whatever.

We therefore confidently submit that upon the record, the judgment of the Supreme Court of Arizona should be reversed and the case remanded with directions to the court below to dismiss this action.

Respectfully submitted,

121 CHARLES F. AINSWORTH,
Attorney General for Arizona,
and L. E. PAYSON,
of Counsel for Appellant.

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No. 119.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 119.

M. J. NUGENT, SUPERINTENDENT OF TERRITORIAL PRISON, APPELLANT,

vs.

THE STATE OF ARIZONA IMPROVEMENT COMPANY, APPELLEE.

APPELLEE'S BRIEF.

EUGENE S. IVES,
L. H. CHALMERS,
Counsel for Respondent.

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IN THE

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THE STATE OF ARIZONA IMPROVEMENT COMPANY, APPELLEE.

APPELLEE'S BRIEF.

STATEMENT.

This is an application for a writ of mandamus requiring the defendant to furnish the plaintiff ten (10) convicts out of the territorial prison at Yuma.

The application is based upon a contract executed between the Territory of Arizona, through its Board of Control, and the plaintiff. The Board of Control was created by a special act of the territorial legislature, which is set forth in full in the appellant's brief. This board has full and

exclusive control of the convicts. It consists of three members, of whom the governor is *ex officio* one. By the terms of the contract it was provided that the plaintiff should have exclusive control of all the able-bodied male convicts in said prison from the hours of 8 a. m. until 5 p. m., and that the superintendent of the prison should "be required" (Record, fol. 9) to furnish said convicts to the plaintiff upon demand. The plaintiff duly demanded the convicts of the superintendent, who refused to furnish them. The Board of Control did not forbid the superintendent to furnish them. The validity of the contract has not been questioned by the Board of Control or by the Territory. The defendant alleges in his answer (fol. 45) that his sole reason for refusing to comply with the plaintiff's demand was that the governor so advised and directed him.

ARGUMENT.

The attention of the court at the outset is respectfully called to the following extracts from the laws of Arizona:

"The board of commissioners shall lease from time to time as it can be done to advantage convict labor to be employed by the lessees * * * but any corporation, firm or person leasing any of such convict labor shall employ the same within the prison walls" * * *

Rev. Statutes, § 2424.

"SEC. 8. All powers and duties now devolved on any of the various boards for the government of the insane asylum, territorial prison or reform school, or required to be performed by them under existing laws are hereby conferred upon the Board of Control created by this act, and it is

hereby made the duty of the Board of Control created by this act to perform all duties required of said boards by existing laws. * * *

"SEC. 9. Said Board of Control * * * shall have full control over * * * the territorial prison * * * Said board shall have the authority to contract with responsible person or persons to furnish the labor of the inmates now within the said prison or that may hereafter be confined therein, or any number of them * * * and the said board may contract to allow such labor to be performed at any place either inside or outside the prison walls." * * *

Laws 1895, chap. 19.

"All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

Rev. Stat., § 2932, 2.

"The writ of mandamus may be issued by the supreme or district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person."

Rev. Stat., § 2335.

"This writ *shall* be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested."

Idem., § 2336.

The issues presented by the pleadings are :

I.

Is the act creating the Board of Control valid ?

II.

If so, is the contract between the Board of Control and the plaintiff valid ?

III.

If so, has the plaintiff a right under such valid contract to the writ of mandamus which is prayed for ?

I.

The validity of the law creating the Board of Control has been attacked upon the grounds :

(A.) That the power to enact such a law was not granted by the organic law.

(B.) That the said law creates a territorial indebtedness, and is therefore within the inhibition of the Harrison act.

(C.) That the said law grants a special privilege to the plaintiff, and is therefore against the provisions of the Harrison act.

(D.) That the said law provides for inflicting punishment upon the convicts, to wit, hard labor, which is not provided for by the penal code, and is therefore *ex post facto* legislation as to all prisoners whose crimes were not committed before its enactment.

(A.) The statute creating the Board of Control is an enactment clearly within the powers conferred upon the legislature by the organic act.

"The local legislature has been entrusted with the enactment of the entire system of municipal law. * * *

"The powers thus exercised by territorial legislatures are nearly as extensive as those exercised by any State legislature."

Harbuckle *vs.* Toombs, 18 Wallace.

(B.) The law creates no indebtedness. It by terms appropriates money out of the general fund to pay for any expenses that may be made necessary by its enactment.

The question of indebtedness can under no circumstances be raised until the operation of the statute actually creates debt.

State *vs.* McCauley, 15 Cal., 430.

(C.) The law does not confer any special privilege whatsoever. It is a general law in its entirety.

(D.) By section 2424 of the Revised Statutes of Arizona, enacted on the 10th of March, 1887, it was provided that the Board of Commissioners should lease the convicts in the territorial prison. The legislature has full authority over the convicts and all persons sentenced to imprisonment are sentenced subject to the duty of the Board of Commissioners to lease their labor.

State *vs.* McCauley, *supra.*

II.

The defendant contends that the contract set forth in the complaint is invalid on the ground that it is unconscionable, inequitable, and without consideration moving from the plaintiff.

The contract provides that the Territory guard, clothe, and feed the prisoners, and that the plaintiff pay to the Territory for the labor of such prisoners the sum of 70 cents per day in water rights out of the canal to be built by the plaintiff, at the rate of $20 for a water right upon each acre of land.

It is not denied that 70 cents a day is unusually high return for convict labor, nor that $20 for an acre water right is a fair price for a water right under the canal proposed to be built by the plaintiff. The contention is that inasmuch as the canal is not constructed, and may never be, a water right has no value.

It is alleged in the affidavit attached to the plaintiff's complaint that 10,000 acres of water rights have been sold for $20 per acre in money to *bona fide* purchasers.

The plaintiff respectfully submits that this is conclusive evidence of the adequacy of the consideration.

The plaintiff respectfully calls the attention of the court to the fact that by section 2424 of the Revised Statutes of Arizona enacted in 1887 the Board of Commissioners of the prison were under a mandatory duty to lease the convict labor, but only for employment within the prison walls.

By the law of 1895, creating the Board of Control, all the said duties which rested upon the Board of Commissioners

were imposed upon the Board of Control, but it was provided that the Board of Control might lease the convict labor *outside the confines of the prison.* The reason for this change in the language of the statute is obvious. The Board of Commissioners for eight years were unable to find a lessee or to procure employment for the convicts in the prison; for eight years the prisoners remained an idle charge upon the Territory. It was thought by the legislature that to permit the prisoners to be worked outside of the prison walls would enable the Board of Control to find a lessee. This contract is the result of such change of legislation.

The construction of the proposed canal will, according to present estimates, cost twelve hundred thousand ($1,200,000) dollars. It will irrigate between seventy (70) and eighty (80) thousand acres of land. The cost of inducting water upon the land will be between fifteen ($15) and twenty ($20) dollars per acre.

One hundred (100) prisoners at 70 cents a day will earn twenty-one thousand ($21,000) dollars in a working year of three hundred (300) days, or two hundred and ten thousand ($210,000) dollars during the entire life of the contract.

The construction of the canal will therefore call for the expenditure of one million ($1,000,000) in money, in addition to the labor of the convicts.

As the water-right conveyance to be given to the Territory in consideration for the labor provides that the Territory shall have a "vested and indefeasible interest in the canal" of the plaintiff, the rights of the Territory cannot be impaired or cut off by any indebtedness contracted by the plaintiff.

If the company should fail before the completion of the

canal, the company would lose all moneys which had been expended by it, but the Territory would still own its interest in the partly completed structure, and the wealth invested in such structure would represent five times as much as the labor which had been provided by the Territory. The Territory, therefore, cannot lose under the contract, and is bound eventually to receive a greater consideration for its labor than is received by any State in the Union.

The State of California leased its convict labor to a water company at Folsom under somewhat similar terms. The State received as consideration for its labor the right to certain power, which did not exist until after the completion of the work upon which the convicts were employed.

The contract upon its face is fair and equitable and shows no sign of an inadequate consideration. The interest of the Territory in the completion of the canal is far greater than the consideration directly received for the labor. The completion of the canal will add ten millions of taxable property to the wealth of the Territory. It will be a great public benefit, and it is entirely to the best interests of the Territory that its construction should be encouraged.

"Mere inadequacy of price or any other inequality in the bargain is not to be understood as constituting *per se* the ground to avoid a bargain in equity.

"Whether one's bargains are wise and discreet, or profitable or unprofitable, or otherwise, are not considerations for courts of justice, but for the party himself to deliberate upon.

"Inadequacy of consideration is not of itself a distinct principle of relief in equity. Common law knows no such principle. *The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value*

of a thing is what it will produce. In order that courts of equity should interfere in the execution of a contract the unconscionableness or inadequacy should be such as would shock the conscience and *would amount in itself to conclusive and decisive evidence of fraud.*"

1 Story's Equity Jurisprudence, sections 244, 245, and 246.

Osgood *vs.* Franklin, 2 Johnson's Chancery, 1.

"Inadequacy of consideration, if it be of so gross a nature as to amount *in itself to conclusive and decisive* evidence of fraud is a ground for cancelling the transaction. In such cases the relief is granted not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby."

Kerr on Fraud and Mistake, page 187, and cases there cited.

Bispham's Principles of Equity, section 219, and cases there cited.

The fact that one of the parties to the contract at bar is a sovereign does not alter the principles above set forth.

Commonwealth *vs.* Proprietors New Bedford Bridge, 2 Gray, 339.

Where one of the parties to a contract is a State, it is not necessary that any consideration should move from the individual to the State.

"It is now too well settled to admit of debate that the State may enter into a valid contract with a private person and that it is not necessary in order to support such a contract that there should be a consideration moving from the party to the State. It will be sufficient if on the faith of the contract the other party had been induced to invest his

money or to employ his time and labor in the furtherance of the enterprise which is the subject-matter of the contract."

Floyd *vs.* Blanding, 54 Cal., 41.

The case at bar comes clearly within the principles set forth in the case last cited. It would have been both legal and proper for the Territory to have leased its convict labor without any consideration whatsoever, if it had been deemed that such leasing would inure to the public good and to the benefit of the Territory. The contract set forth in the petition contemplates millions of dollars of direct increase to the taxable property of the Territory. On its faith large sums of money have been invested and spent.

"In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

"When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

"A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign State. A grant is a contract executed."

Fletcher *vs.* Peck, 6 Cranch, 87.

The benefits to flow from the completion of the canal constitute a legal consideration, even if no direct consideration passed to the Territory from the company.

III.

The discussion of the right of the plaintiff to the mandamus prayed for involves two considerations:

(A.) In general, should a mandamus issue?

(B.) If so, is the defendant Nugent the proper party against whom the writ should be directed?

(A.) A writ of mandamus should issue to "compel the admission of the plaintiff to the use and enjoyment of its right" to the exclusive control of the convict labor, from which it is precluded by the action of the defendant.

The language of the contract is clear and explicit. Under its provisions the convict labor belongs exclusively to the plaintiff. There is no remedy whereby the plaintiff can obtain the possession of its own except the issue of this writ.

"A mandamus is a prerogative writ to the aid of which the public is entitled upon the proper case previously shown to the satisfaction of the court. The original nature of the writ and the end for which it was framed direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police; therefore it ought to be issued upon all occasions where the law has established no specific remedy and *wherein justice and in good government there ought to be one.*"

Rex *vs.* Barker, 3 Burrow, 1267.

This general principle laid down by Lord Mansfield is the foundation of all the law on the subject of mandamus. It

has been followed and adopted by the Supreme Court of the United States and by most of the State courts.

United States *vs.* Madison, 1 Cranch, 170.
La Grange *vs.* State Treasurer, 24th Michigan, 468.
Com. *vs.* Dennison, 24th How., U. S., 66.

Plaintiff submits that there is absolutely no remedy whereby it may enjoy its rights under this contract except the remedy by mandamus.

A Territory cannot be sued. An action for damages or for specific performance would not lie. Therefore the plaintiff is entitled, if the contract be held by the court valid, to the writ prayed for.

Langford *vs.* King, 1 Mont., 33.

In this case the court says:

"Montana Territory is a government created, it is true, by a law of Congress, yet that law gives it very extensive powers. The reason of the law which declared that no government can be sued without its consent applies to this territorial government as well as to any other government. We hold, therefore, that unless permitted by some law of this Territory or of the General Government no citizen can sue it. There is no law of this Territory or act of Congress permitting it. There is then no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply upon the good faith of the Territory."

In the case of Fiske *vs.* Cuthbert, 2 Mont., 508, this doctrine was affirmed. The court awarded the writ of mannamus, saying:

"What was the remedy of the respondents? They cannot enforce their claim by an action against the Territory."

If the court should not concur in this doctrine laid down by the Montana courts, it is still submitted that, even though a Territory may not plead the sovereign power and is liable to suit, still the plaintiff is entitled to the writ of mandamus on the ground that it has no plain, adequate or speedy remedy at law.

An action for damages would clearly be neither plain, speedy, nor adequate. An action for specific performance is not a remedy at law, but in equity, and it has been expressly held in many cases that a remedy by suit in equity is not such a remedy at law as will defeat the right to mandamus.

La Grange *vs.* State Treasurer, 24th Mich., 468.
People *vs.* Mayor of New York, 10 Wendell, 393.

Decisions may doubtless be found wherein the court in rendering opinions has given expression to isolated sentences which might be construed against the right of a person to a mandamus in cases somewhat similar to the one at bar.

Notably is this so in the case relied upon by the defendant, to wit, People *vs.* Du Laney, 96 Ill., 543.

In the Du Laney case the contract with the State was held to be invalid, the contracting parties not having fulfilled the requirements of the law.

It is emphatically asserted on behalf of the plaintiff that no case can be found in any English or American report wherein a plaintiff has been denied the right of mandamus, when by reason of such denial he was entirely precluded from any valuable

right. In all cases where the right has been denied it will be found that the court denying it has pointed out a process whereby the party might still find a clear road to justice.

The attention of the court is particularly invited to the case of La Grange *vs.* State Treasurer, 24th Mich., 469, in which the doctrine that the court will issue the writ of mandamus whenever true justice requires it is laid down and discussed with great learning:

"The jurisdiction of this court in mandamus cases is not statutory but *plenary.* * * * In granting this remedy courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature, which is not adequate, furnishes no reason for refusing it if the *necessity of justice requires it.*

"We had occasion in La Grange *vs.* State Treasurer, 24th Mich., 468, to consider this jurisdiction quite fully, and we think the views there expressed are in accordance with the soundest authority.

"Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subject to serious injustice.

"As pointed out by the eminent authorities there cited, it is from its very nature a remedy *that cannot be hampered by any narrow or technical bonds.* The right, coupled with the necessity of such a vindication of it, supports the jurisdiction, and the court in using its discretion, while careful not to use this writ when it is not essential, will apply it where it is. * * *

"*It is well settled that the existence of a specific remedy in equity does not oust the legal jurisdiction, but only appeals to the discretion of the common-law court.*

"Mr. Spence in his treatise on equitable jurisdiction refers to the jurisdiction in mandamus as one which if fully exercised might have rendered much of the interference of equity needless."

1 Spence, Equity Jurisprudence, 704.

Tamas Railroad Co. *vs.* The Circuit Judge for Tasco County, 44 Mich., 479.

The Revised Statutes of Kansas authorized a mandamus to issue only: "To compel the performance of an act which the law especially enjoins as a duty resulting from an office trust or station."

Compiled Laws of Kansas, page 696.

The courts in that State have issued a mandamus on the relation of a citizen against the secretary of state of Kansas, the practical effect of which was to enforce an *executory* contract made by the relator with the State of Kansas; which contract the State by legislative enactment had endeavored to repudiate.

State *vs.* Barker, 4 Kas., 324–435.

In the State of New York, where the language of the statute is not nearly so comprehensive as that of the Arizona statute, the principle is laid down by the courts and followed in numerous cases in this language: "To entitle a party to a writ of mandamus he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed."

People *vs.* Hayt, 66 N. Y., 607.

People *vs.* Canal Appraisers, 73 N. Y., 443.

The extreme lengths to which the court will go in imposing a duty upon the party against whom the right is sought, when the relator has a clear right and has no way of enforcing such right, except by the writ of mandamus, is exemplified in the case of The People *vs.* The German Hospital, 8 Abbot New Cases, 332. In that case there was absolutely no duty on the part of the respondent, but the writ was issued against it on the purely ethical ground that the plaintiff had a right, and that every right involves a duty somewhere, and inasmuch as the plaintiff could not enjoy her right unless the writ were issued, the duty was implied and the court awarded the writ.

"Although no action lies against the sovereign for a breach of contract, yet whenever that contract in any form comes before the court the rights and obligations of the parties to it must be adjusted upon the same principle as if the contracting parties were private persons."

People *vs.* Stevens, 71 N. Y., 527.

(B.) Nugent is the proper party against whom the writ should be directed.

The attention of the court is particularly invited to the fact that Nugent and not the Territory of Arizona is the defendant in this proceeding. The Board of Control did not object to the carrying out of this contract. It does not appear that such board gave any instruction whatsoever to Nugent with respect to it.

The Territory of Arizona has not attempted to repudiate it.

The Board of Control has not questioned its validity nor directed the superintendent to refuse to deliver the convicts to the plaintiff.

In his answer the defendant specifically alleges his contumacy.

He confesses that he refused the plaintiff's demand in obedience to the advice and direction of the governor of the Territory, "and not otherwise" (fol. 45.)

The governor is a minority member of the Board of Control, and as governor had no authority whatsoever in the premises.

By the terms of the contract the superintendent is "required" to furnish the convicts upon demand.

The statute defining the duties of the superintendent is meager. As a matter of fact, he has full charge of the convicts and the prison. It is so alleged in the complaint and not denied.

His authority alone bars the way to the "admission of the plaintiff to the enjoyment" of its right.

Every right involves a corresponding duty.

The legislative act gives the board the power to make the contract as well as "full control" over the prisoners and inmates. In respect to the contract the powers of the superintendent are necessarily subordinate to the powers of the board. He has no power to question the expediency, policy, judiciousness, or advisability of the legal acts of the board, or to disregard and set at naught its lawful promises, contracts, and obligations. No statute gives him this negative power. To the contrary, it is his official duty to observe the lawful directions and commands of the board and to carry out its valid contracts. Such a duty is a necessary incident to his office; any other result would attribute to the legislature the stupidity of giving to the board the power to make the contract and to the superintendent the power to cancel it.

Suppose this was a proceeding by the board to compel the superintendent to deliver the convicts in accordance with the contract, can it be seriously questioned but that his obedience would be enforced by the writ? Assuming that the board could sue out the writ to enforce this duty, there can be no well-founded reason to deny the use of the same remedy to the party beneficially interested. The contract expressly requires the superintendent to deliver the convict labor, and is to be construed as a direction from the board in this respect—a direction or command from a superior to an inferior officer in immediate charge of the convicts, whose ministerial duty must put the machinery in motion to execute the contract. The writ only lies against the party whose legal duty it is to perform the act required, and for this reason the Board of Control is not a necessary party to this proceeding.

The People *vs.* Brennan, 39 Barb., 522 at page 536.
The People *vs.* Common Council, 3 Keyes, 81.
Farrel *vs.* King, 41 Conn., 447.
People *vs.* Palmer, 35 N. Y. Supp.

If the Board of Control, his official superiors, had directed Nugent not to deliver the convicts, it may be that the board would have been a necessary party to this action.

The plaintiff was advised that the Board of Control was in favor of the execution of the contract. Two of its members had signed it. The board had done no act upon which a proceeding against them could have been based.

If the defendant in his answer had alleged as reason for his refusal that he had been forbidden by the Board of Control, or even that he awaited positive instruction from

the board, it might have been proper or necessary for the plaintiff to amend its complaint and make the Board of Control a party.

But the defendant made no such allegation. He totally disregarded his lawful superiors and avowed that his conduct was regulated entirely by the direction of another person.

It is further submitted that it is not material whether the Board of Control should or should not have been made a party. To all intents and purposes, they have been represented in the entire litigation.

If this court should arrive at the conclusion that the plaintiff is entitled to a mandamus, but that the Board of Control was a necessary party, there would be no objection even now to permitting the plaintiff to amend his complaint. At most it would be a matter of the adjustment of costs.

In conclusion, the appellee rests its right to a mandamus upon the broad principle laid down by Lord Mansfield and Chief Justice Taney in the cases cited and on the very comprehensive language of the statute of Arizona.

The plaintiff confidently asserts that not a single case can be cited where the writ of mandamus has been refused to one applying for it when such refusal would leave the plaintiff deprived of a right.

Respectfully submitted.

EUGENE S. IVES,
L. H. CHALMERS,
Counsel for Respondent.

NUGENT *v.* ARIZONA IMPROVEMENT COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 119. Argued and submitted January 10, 11, 1899. — Decided February 20, 1899.

Under the act of March 8, 1895, of the legislature of the Territory of Arizona, relating to convict labor and the leasing of the same, the board of control thereby created and given charge of all charitable, penal and reformatory institutions then existing, or which might thereafter be created in the Territory, could not dispense with the bond required by the statute to be given by the person or persons leasing the labor of the convicts, for the faithful performance of their contract; and no contract made by the board leasing the labor of the convicts could become binding upon the Territory, until a bond, such as the statute required, was executed by the lessee and approved by the board.

In this case as it appears that no such bond was executed, the plaintiff was not in a position to ask relief by mandamus.

THE case is stated in the opinion.

Mr. Charles F. Ainsworth, Attorney General of Arizona, and *Mr. L. E. Payson* for appellant, submitted on their brief.

Mr. Eugene S. Ives for appellee. *Mr. L. H. Chalmers* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of the legislative assembly of the Territory of Arizona, approved March 8, 1895, the governor and auditor of the Territory, together with one citizen to be appointed by the governor with the advice and consent of the council, were constituted a board of control and given charge of all charitable, penal and reformatory institutions then existing or which might thereafter be created in the Territory.

It was provided by the ninth section of the act that the

board of control, after qualifying and entering upon their duties, should have full control over the territorial insane asylum, the territorial reform school and territorial prison, together with all property, buildings and lands belonging thereto or that should thereafter be acquired. That section further provided: "Sixty days after the passage of this act they shall have the power and authority to enter into an agreement or agreements with a responsible person or persons, to lease on shares or for cash the property, buildings and lands or any part thereof now belonging to the Territory, wherever said buildings and lands may be located, or that may hereafter be acquired for the purpose of furnishing employment for the inmates of the said territorial prison and the said territorial reform school. The said board shall have the authority to contract with a responsible person or persons to furnish the labor of the inmates now within the said reform school or said prison, or that may hereafter be confined therein, or any number of them, for the best interests of the Territory; provided, however, that at no time shall the labor of the inmates of the said territorial prison or territorial reform school be leased to any person or persons when the labor of the inmates of said institution is required upon any buildings or properties of the aforesaid institutions, and no lease or contract shall be made that will obligate the Territory to furnish tools, machinery or money, or make other expenditure other than the labor of the inmates, properly clothed and fed, and the proper guards for same, together with the use of the property, buildings and lands heretofore mentioned; provided, that no contract or lease shall be made to extend for a term of more than ten years from the time of making said lease or contract. And the said board may contract to allow such labor to be performed at any place either inside or outside the prison walls or the confines of the reform school, but if a contract be made to allow labor to be performed outside of the prison walls or confines of the reform school, it must be done under proper restrictions, having regard for the safety of the prisoners or inmates. A good and sufficient bond must be given by the person or persons leasing the labor of inmates of the

aforesaid institutions for the faithful performance of such contract; said bond to be approved by the board of control." Laws of Arizona, 1895, pp. 20, 22.

This statute being in force, a written agreement was made December 2, 1896, between "the Territory of Arizona, by L. C. Hughes, Governor, C. P. Leitch, auditor, and M. H. McCord, constituting the board of control of the Territory of Arizona," of the first part, and the State of Arizona Improvement Company, of the second part. That agreement contained among other provisions the following:

"The party of the second part having submitted its good and sufficient bond for the faithful performance of this contract, which said bond has been approved by the said board of control, and each of its members, and is herewith delivered and accepted, the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, reserved and contained on their part, and on behalf of the said party of the second part to be done and kept and performed, hath granted, bargained, demised, leased and to farm letten to said party of the second part, its successors and assigns, all that certain real estate; . . . also all the labor of the male convicts now in the territorial penitentiary, or who may hereafter be confined therein, to have and to hold the labor of said penitentiary convicts unto said party of the second part, and to its assigns, for the term of ten years from the date of these presents; and the lands and premises above described for and during and until the end of the full term of ten years to be fully completed and ended, and it is further stipulated and agreed by and between the parties hereto that in the event of the removal of the territorial prison from Yuma County, Territory of Arizona, to any other portion of the Territory, such removal will in no way, manner, shape or form interfere with the conditions, stipulations and covenants of this contract and lease.

"It is further understood, stipulated and agreed by and between the parties hereto, that the party of the second part is to have the exclusive control of the labor of the convicts in the territorial prison from 8 o'clock A.M. to 5 o'clock P.M.,

during the said term of ten years from the date of these presents, Sundays and legal holidays excepted.

"It is further agreed by and between the parties hereto that the party of the first part, or its agent or agents, will furnish the said convict labor to the party of the second part, at the place or places designated by the said party of the second part, or its agents, in Yuma County, Arizona Territory, properly guarded, clothed, fed and ready to commence work at the hours and terms heretofore mentioned, and the party of the first part shall properly guard said convicts during the hours of labor. The party of the second part is to furnish all the tools and machinery necessary for the use of the convicts while at work under the conditions of this contract and lease, but the said party of the first part shall not be compelled to take outside of the prison, under guard, parties of less than five convicts. . . .

"The superintendent of the prison or agent of the Territory having the convicts in charge shall be required to furnish the convicts in such numbers as may be required from time to time up to the amount of all the able-bodied male convicts; to deliver them at such points or places in Yuma County, as may be demanded of him, by the party of the second part, its agent or agents. The party of the second part further agrees to keep a current and accurate account of the number of days worked by convicts, and on the first Monday of each calendar month to make a statement of the total number of days done the previous month by all the convicts employed by the said party of the second part, and shall furnish a copy of the said statement to the Superintendent of the territorial prison, properly verified by an agent of the company.

"The said party of the second part agrees to compensate the party of the first part for such convict labor as follows, to wit: The value of each convict's labor shall be placed at 70 cents per day, and as soon as the party of the first part has furnished convict labor at the rate of 70 cents per day, aggregating the sum of sixteen hundred dollars, the party of the second part shall issue its perpetual water-right deed for eighty

acres of land, of the water in its canal, when such canal is completed. . . .

"It is further covenanted and agreed, by and between the parties hereto, that after the water rights hereinbefore provided for are earned by said party of the first part, then as soon as the labor of convicts at the rate of 70 cents per day, for each day's labor, amounts to sixteen-hundred dollars, the party of the second part shall issue water-right certificates for one eighty-acre water right. . . .

"It is further stipulated by and between the parties hereto in consideration of the covenants herein contained, that the said party of the second part is to use such of said convicts' labor —— this contract and lease as it may from time to time require, and such party of the second part need not commence to use any of said labor sooner than five months from the date hereof.

"It is further stipulated and agreed by and between the parties hereto, in consideration of the covenants herein contained, to be performed by each of the parties hereto, and in consideration of the convict labor herein mentioned, that the lease of the lands herein described shall commence on and from the day when the water shall be conducted in the canal of the party of the second part to lands, convenient for the said water to be conducted upon the said lands hereinbefore described, and shall terminate ten years thereafter; and that the party of the second part shall pay to the party of the first part, as rent therefor, an annual sum, to be hereafter determined upon in cash, or at the option of the party of the second part, one half of the net products of the said lands; provided, however, that the said lease shall commence to run within four years from date.

"It is further agreed, covenanted and declared that these presents are made, executed and delivered for the best interest of the Territory of Arizona, and for the purpose of furnishing employment for the inmates of the said territorial prison — the labor of said inmates being not required upon any buildings or properties of any institution of said Territory."

On the 22d day of April, 1896, it was agreed in writing

between the parties as follows: "The time for commencing work under this contract is hereby extended to the 10th day of June, 1896, and it is fully understood and agreed by the parties hereto that this extension is in no way to affect the legal status of said contract. It is understood and agreed that the rights of the parties thereto are to remain in *statu quo*, and the extension herein made is not intended to ratify, alter or impair said contract or to give it any validity whatsoever that it does not before the signing of this instrument possess."

Later, a supplemental agreement in writing was made between the same parties, but in the view which the court takes of this case it need not be set out in this opinion.

On the 26th day of May, 1896, the State of Arizona Improvement Company filed its complaint in the district court of the third judicial district of the Territory in and for the county of Yuma, in which reference was made to the above agreements with the board of control, and in which it was alleged that it was a corporation organized under the laws of the Territory; that M. J. Nugent, a resident of Yuma County, was the superintendent of the territorial prison at Yuma, and as such had full control of the prisoners confined in that prison, subject only to the direction of the board of control of the Territory; that on the 25th day of May, 1896, the plaintiff company demanded in writing of said Nugent, superintendent aforesaid, that in pursuance of the contract between it and said board of control he furnish to plaintiff on the 2d day of June, 1896, at 8 A.M., ten able-bodied male convicts out of the territorial prison at Yuma, properly guarded, on the outside of the gate of the territorial prison; that on the next day Nugent served a written notice on the plaintiff, whereby he peremptorily declined to furnish the convict labor at such time and place or at any time and place; and that the plaintiff had not a plain, speedy or adequate remedy in the ordinary course of law.

The complaint was supported by the affidavit of the president of the plaintiff company.

The relief asked was that a writ of mandamus issue, directed

to Nugent, superintendent of the territorial prison, directing and commanding him to furnish to the plaintiff ten able-bodied male convicts out of the territorial prison at Yuma, on the 2d day of June, 1896, on the outside of the prison gate at Yuma, properly guarded; and that plaintiff have such other and further relief as to the court seemed meet and just.

An alternative writ of mandamus was issued, and Nugent, as superintendent of the prison, excepted to the sufficiency of the complaint, and demurred thereto upon these grounds: 1. That the complaint did not state facts sufficient to authorize a writ of mandamus. 2. That the plaintiff sought to compel the performance of an act by the respondent as superintendent of the territorial prison which the law did not specially enjoin upon him as a duty resulting from his office. 3. That the petition sought to compel the performance of a contract made by others and not by respondent. 4. That the alleged contract was void, because authorized only by a pretended law which was void.

Nugent also filed an answer, alleging, among other things, that there was a want of proper parties defendant; that the Territory had no power to hire out the convicts confined in the territorial prison who had not been sentenced to punishment with hard labor, nor to authorize the convicts to be taken out and away from the territorial prison where punishment and sentence was by confinement in such prison; that the board of control had no power to make the contract sought to be enforced; that the contract was itself without consideration and in violation of the act of March 8, 1895, in that it was for a period of over ten years; that the contract took the entire convict labor for the period just named in violation of the provisions of the act providing that said labor should not be leased out when it was needed to work on the buildings and premises of the territory; and that the contract was against public policy in authorizing all the prisoners to be taken from the prison and to remain away from it in many cases for the entire period of their sentence.

The answer also averred "that as the duly appointed, qualified and acting superintendent of the territorial prison at

Yuma, Arizona, previous to the service of the alternative writ herein, this defendant was advised and informed by the Honorable B. J. Franklin, as Governor of the Territory of Arizona, that the said pretended contract mentioned in the application herein was and is of no valid force and effect, and further advised and informed in substance and to the effect that said contract was not of any legal force or binding effect upon said Territory or said board of control, and, among other things concerning the same, the said Honorable B. J. Franklin, acting as such Governor, authorized and directed this defendant in substance and to the effect that in the event that the said State of Arizona Improvement Company should, by its officers or agents, make a demand upon this defendant to do or perform anything under the provisions of said contract, and especially if such demand should be made for the delivery of any prisoners confined in or inmates of said penitentiary to the said company, its officers or agents, at the gate of said prison or elsewhere, that this defendant, acting as such superintendent, should politely, but firmly, refuse such request or any request made or to be made under the provisions of said pretended contract; that acting under the advice and information given by the Honorable B. J. Franklin, Governor of this Territory, and of the direction of the head of the executive department of this Territory, this defendant alleges that he made the refusal complained of in the application herein and not otherwise. . . . Respondent further avers and gives the court to know that the State of Arizona Improvement Company has not, before the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any of the courts of this Territory for the faithful performance of said contract, as required by said pretended board of control act."

The case was heard in the district court on the complaint and the demurrer and answer. The demurrer of the defendant was overruled, and the contracts set forth in the complaint were the only evidence adduced at the trial. The defendant having declined to amend the pleadings or to offer further evidence, and having elected to stand upon the pleadings, the

court found for the plaintiff, and ordered a peremptory writ of mandamus to issue.

A new trial having been refused, the case was carried to the Supreme Court of the Territory, where the judgment of the district court was affirmed.

We are of opinion that the Supreme Court of the Territory erred in affirming the judgment of the district court awarding a writ of mandamus against the defendant Nugent.

The statute under the authority of which the board of control made the contracts referred to in the complaint expressly required a good and sufficient bond to be given by the person or persons leasing the labor of inmates of the territorial prison for the faithful performance of such contract, which bond was to be approved by the board. The complaint asking for a mandamus against the superintendent of the prison did not distinctly allege the execution of such bond. But the answer of Nugent alleged that the defendant in error had not, prior to the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any court of the Territory for the faithful performance of its contract, as required by the act of March 8, 1895. That act it is true did not in terms require the execution and delivery of a bond prior to or contemporaneously with the making of a contract with the board of control. But it is clear that the board could not dispense with the bond, and that no contract made by them leasing the labor of the convicts could become binding upon the Territory until a bond such as the statute requires was executed by the lessee and approved by the board. The recital in the agreement of December 2, 1896, that the lessee had submitted, and that the Board had approved, a good and sufficient bond for the faithful performance of that agreement, may have been made in the expectation that such a bond would be executed before the agreement became effective as between the parties. But as the case was heard upon the pleadings, without any evidence except the written agreements between the board of control and the Improvement Company, the mere recital referred to cannot be taken as sufficient to disprove the averment in the answer as to the non-

execution of the required bond. If the plaintiff was entitled to the relief asked by a proceeding against the superintendent, without bringing the members of the board of control before the court, it should have shown by allegation and proof that the required bond had been executed. If no bond was executed as required by the statute, the plaintiff was not in a position to ask relief by mandamus. The superintendent of the prison may not have been charged by law with knowledge of the provisions of the statute, but he was aware of its provisions, and was bound not to allow the convicts to go beyond his control under an agreement that did not conform to the statute. An agreement unaccompanied by the required bond would not justify him in surrendering custody and control of the convicts or any of them. As it must be taken upon the present record that the Improvement Company never executed the bond required by the statute, the district court erred in giving any relief.

Under the circumstances, it may not be inappropriate to say that in the printed brief of the Attorney General of Arizona it is distinctly stated that no bond had ever been executed, and that statement is not disputed in the printed brief subsequently filed for appellee, nor was it disputed by counsel for appellee in oral argument.

Without expressing any opinion in reference to other questions discussed by counsel, some of which are important, the judgment of the Supreme Court of the Territory is for the reasons stated

Reversed, with directions to remand the case to the district court for such further proceedings as may be consistent with this opinion and with law, and it is so ordered.